DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-1036
Title: Doretha H. Henderson, Authorized Representative of David L. Henderson, Deceased, Petitioner
v.
Eric K. Shinseki, Secretary of Veterans Affairs
Docketed: February 26, 2010
Lower Ct: United States Court of Appeals for the Federal Circuit
Case Nos.: (2009-7006)
Decision Date: December 17, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 24 2010	Petition for a writ of certiorari filed. (Response due March 29, 2010)
Mar 24 2010	Order extending time to file response to petition to and including April 28, 2010.
Mar 26 2010	Brief amicus curiae of United Spinal Association filed.
Mar 26 2010	Brief amicus curiae of Paralyzed Veterans of America filed.
Mar 26 2010	Brief amici curiae of National Organization of Veterans's Advocates, Inc., et al. filed.
Apr 21 2010	Order further extending time to file response to petition to and including May 28, 2010.
May 26 2010	Brief of respondent Eric K. Shinseki, Secretary of Veterans Affairs in opposition filed.
Jun 3 2010	Reply of petitioner David L. Henderson filed.
Jun 8 2010	DISTRIBUTED for Conference of June 24, 2010.
Jun 28 2010	Petition GRANTED.
Jul 13 2010	Motion to dispense with printing the joint appendix filed by petitioner David L. Henderson.
Jul 20 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including September 10, 2010.
Aug 16 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Sep 2 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for petitioner.
Sep 7 2010	SET FOR ARGUMENT ON Monday, December 6, 2010.
Sep 7 2010	Justice Kagan is recused in this case.
Sep 10 2010	Brief of petitioner David L. Henderson filed.
Sep 16 2010	Brief amici curiae of Paralyzed Veterans of America, and AARP filed.
Sep 17 2010	Brief amicus curiae of United Spinal Association filed.
Sep 17 2010	Brief amicus curiae of American Legion filed.
Sep 17 2010	Brief amicus curiae of National Veterans Legal Services Program filed.
Sep 17 2010	Brief amici curiae of National Organization of Veterans' Advocates, Inc., et al. filed.
Sep 17 2010	Brief amicus curiae of Federal Circuit Bar Association filed.
Sep 17 2010	Brief amicus curiae of Allan G. Halseth filed.
Sep 21 2010	The time to file respondent's brief on the merits is extended to and including November 1, 2010.
Sep 27 2010	CIRCULATED
Oct 1 2010	Record received from U.S.C.A. for Fedral Circuit. (1 envelope)
Nov 1 2010	Motion to substitute party filed by Doretha H. Henderson, the authorized representative of David L. Henderson, deceased.

Nov 1 2010	Brief of respondent Eric K. Shinseki, Secretary of Veterans Affairs filed. (Distributed)
Nov 8 2010	Motion DISTRIBUTED for Conference of November 12, 2010.
Nov 15 2010	Motion of Doretha H. Henderson, the authorized representative of David L. Henderson, to be substituted as petitioner GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Nov 19 2010	Reply of petitioner Doretha H. Henderson, Authorized Representative of David L. Henderson, Deceased filed. (Distributed)
Dec 6 2010	Argued. Lisa S. Blatt, Wasghington, D. C. For respondent. Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

FILED

No. 09- 091036 FEB 24 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID L. HENDERSON,

Petitioner,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 7266(a) of Title 38, U.S.C., establishes a 120-day time limit for a veteran to seek judicial review of a final agency decision denying the veteran's claim for disability benefits. Before the decision below, the Federal Circuit in two en banc decisions held that Section 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling under this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). In the divided en banc decision below, however, the Federal Circuit held that this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), superseded *Irwin* and rendered Section 7266(a) jurisdictional and not subject to equitable tolling.

The question presented is whether the time limit in Section 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling, or whether the time limit is jurisdictional and therefore bars application of that doctrine.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT	2
I. Statutory Framework	3
II. Proceedings Below	5
REASONS FOR GRANTING THE PETITION	11
A. The Question Presented Is Recurring and Important	12
B. The Federal Circuit's Decision Is Wrong	18

Contents

		Page
1.	Section 7266(a) is a statute of limitations for bringing suit against the Secretary for veterans benefits ..	19
2.	The court of appeals' decision conflicts with *Bowen* and *Irwin*	22
3.	*Bowles* is inapposite	26
CONCLUSION		33

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Federal Circuit Decided December 17, 2009 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For Veterans Claims Decided July 24, 2008 ..... 74a

Appendix C — Order Of The United States Court Of Appeals For Veterans Claims Dated August 3, 2007 ..... 93a

Appendix D — Order Of The United States Court Of Appeals For Veterans Claims Dated October 31, 2006 ..... 96a

Appendix E — Order Of The United States Court Of Appeals For Veterans Claims Dated March 14, 2006 ..... 98a

Appendix F — Opinion Of The Board Of Veterans' Appeals, Department Of Veterans Affairs Dated August 30, 2004 ..... 103a

TABLE OF AUTHORITIES

Page

Cases

Bailey v. West,
160 F.3d 1360 (Fed. Cir. 1998) (en banc) .. 6, 22, 31

Barrett v. Principi,
363 F.3d 1316 (Fed. Cir. 2004) 6

Bartlett v. Nicholson,
21 Vet. App. 415, 2006 WL 3200849
(Sept. 8, 2006) 15

Bowen v. City of New York,
476 U.S. 467 (1986) ..... *passim*

Bowles v. Russell,
551 U.S. 205 (2007) ..... *passim*

Brown v. Gardner,
513 U.S. 115 (1994) 13, 18

Commissioner v. Bollinger,
485 U.S. 340 (1988) 27

FCC v. Pottsville Broadcasting Co.,
309 U.S. 134 (1940) 27

Fishgold v. Sullivan Dry Dock & Repair Corp.,
328 U.S. 275 (1946) 18

Authorities

Page

Heckler v. Day,
467 U.S. 104 (1984) 23, 29

Howard v. Shinseki,
No. 08-3606E, 2010 WL 318531
(Vet. App. Jan. 28, 2010) 15

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) ..... *passim*

Jaquay v. Principi,
304 F.3d 1276 (Fed. Cir. 2002) (en banc)
..... 6, 19-20, 21, 31

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 18

Kirkendall v. Department of the Army,
479 F.3d 830 (Fed. Cir.) (en banc),
cert. denied, 552 U.S. 948 (2007) 16, 17, 20

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 21

McCarley v. Massanari,
298 F.3d 1072 (9th Cir. 2002) 24

Nevada v. Hicks,
533 U.S. 353 (2001) 27

Shepard v. NLRB,
459 U.S. 344 (1983) 27

Authorities

Page

Shinseki v. Sanders,
129 S. Ct. 1696 (2009) 3, 13, 18, 24, 30

Sims v. Apfel,
530 U.S. 103 (2000) 24, 27

Snyder v. Barnhart,
212 F. Supp. 2d 172 (W.D.N.Y. 2002) 29

Stone v. INS,
514 U.S. 386 (1995) 24

Torres v. Barnhart,
417 F.3d 276 (2d Cir. 2005) 29

Walters v. National Association of Radiation Survivors,
473 U.S. 305 (1985) 3, 27

Zuberi v. Nicholson,
19 Vet. App. 541 (2006) 15

Statutes, Regulations, and Rules

28 U.S.C. § 1254 1

28 U.S.C. § 2107 ..... 7, 26, 30, 31

28 U.S.C. § 2412 15

Authorities

	Page
38 U.S.C. § 5101	3
38 U.S.C. § 5103A	3
38 U.S.C. § 5104	3
38 U.S.C. § 7101	3
38 U.S.C. § 7104	1, 3, 4, 19, 30
38 U.S.C. § 7105	30
38 U.S.C. § 7106	30
38 U.S.C. § 7107	30
38 U.S.C. § 7108	30
38 U.S.C. § 7251	4
38 U.S.C. § 7252	4, 8, 20, 21, 28
38 U.S.C. § 7261	21
38 U.S.C. § 7262	21
38 U.S.C. § 7263	21
38 U.S.C. § 7264	21

Authorities

Page

38 U.S.C. § 7265 21

38 U.S.C. § 7266 ..... *passim*

38 U.S.C. § 7267 21

38 U.S.C. § 7268 21

38 U.S.C. § 7269 21

38 U.S.C. § 7292 ..... 5, 12

42 U.S.C. § 405 ..... 22, 23, 29, 30

Veterans' Judicial Review Act of 1988,
Pub. L. No. 100 687, 102 Stat. 4105
(Nov. 18, 1988) 3 4

29 C.F.R. § 1614.405 ..... 27 28

29 C.F.R. § 1614.407 28

38 C.F.R. § 20.700 ..... 3, 27

Fed. R. App. P 4 ..... 7, 26, 28

Page

Other Materials

Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, at table B-5 (2000-2008), *available at* http://www.uscourts.gov/judbusc/judbus.html 28

Battling the Backlog, Part II: Challenges Facing the U.S. Court of Appeals for Veterans' Claims: Hearing Before the S. Comm. on Veterans' Affairs, 109th Cong. (2006), *available at* http://frwebgate.access. gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:29716.pdf 15

Black's Law Dictionary 1546 (9th ed. 2009) ... 19

Brief for the Petitioner, *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009) (No. 07-1209) 24, 31

Brief in Opposition, *Department of the Army v. Kirkendall*, 552 U.S. 948 (No. 07-19) 17

Court of Appeals for Veterans Claims, *Annual Reports* (2000-2009), *available at* http://www.uscourts.cavc.gov/ documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf 14, 15

Authorities

Page

H.R. Rep. No. 100-963 (1988) 4, 13, 18, 21

Petition for a Writ of Certiorari, *Department of the Army v. Kirkendall*, 552 U.S. 948 (2007) (No. 07-19) 16

Remarks by the President at Arlington National Cemetery (Nov. 11, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-veterans-day-arlington-national-cemetery (last visited February 16, 2010) ... 13

S. Rep. No. 100-418 (1988) 4, 18, 21, 24

U.S. Department of Veterans Affairs, *FY 2011 Budget Submission, Vol. 1: Summary Vol.* (2010), *available at* http://www4.va.gov/budget/ docs/summary/Fy2011_Volume_1-Summary_Volume.pdf 14

U.S. Department of Veterans Affairs, *FY 2009 Performance and Accountability Report, Executive Summary* (2009), *available at* http://www4.va.gov/budget/docs/report/FY2009-VAPAR_Executive_Summary.pdf ... 14

OPINIONS BELOW

The en banc opinion of the court of appeals is reported at 589 F.3d 1201. Pet. App. 1a-73a. The opinion of the Court of Appeals for Veterans Claims ("Veterans Court") dismissing the case for lack of jurisdiction is reported at 22 Vet. App. 217. Pet. App. 74a-92a. The final agency decision issued by the Board of Veterans' Appeals ("Board") denying the claim for disability benefits is unreported. *Id.* at 103a-17a.

JURISDICTION

The court of appeals entered judgment on December 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 7266(a) of Title 38, U.S.C., establishes the time limit for a veteran to commence an action in the Veterans Court challenging a denial of disability benefits by the Board:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

STATEMENT

While our military fights simultaneous wars in Iraq and Afghanistan, the United States successfully urged the Federal Circuit to hold that Congress forbade this Nation's veterans in *all* cases from obtaining equitable tolling of the time limit to seek judicial review of a final agency decision denying disability benefits. As the dissenting judges aptly observed, the decision below "creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Pet. App. 46a. The dissent was right to call this outcome "indefensible" and a "heavy blow" that "will prove calamitous for many severely disabled veterans." *Id.* at 68a, 70a, 71a.

In casting aside two en banc decisions that for over a decade governed the ability of thousands of veterans to obtain judicial review of disability benefit denials, the majority reasoned that this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), superseded *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), with respect to time limits for seeking judicial review of agency action. Pet. App. 33a-34a. Because the Federal Circuit has exclusive jurisdiction to decide the issue, no circuit conflict on the question presented is possible and the decision below will have immediate nationwide effect on one of the country's largest and most important public benefit programs. This Court's review is clearly warranted to determine whether *Irwin* or *Bowles* governs the time limit for filing suit to challenge an agency decision denying veterans benefits.

I. Statutory Framework

a. *Administrative Process.* A veteran seeking benefits for a service-connected disability begins the administrative process by filing an application at one of over fifty regional offices of the Department of Veterans Affairs ("VA"). 38 U.S.C. § 5101(a). Throughout the administrative process, the Secretary of Veterans Affairs ("Secretary") has a statutory "duty to assist" the veteran in developing his or her claim. *Id.* § 5103A(a). The VA regional office must notify the veteran "on a timely basis" whether the Secretary will provide disability benefits. *Id.* § 5104(a); *see Shinseki v. Sanders*, 129 S. Ct. 1696, 1700-01 (2009).

The initial decision of the VA regional office is "subject to one review on appeal to the Secretary." 38 U.S.C. § 7104(a). "Final decisions of such appeals shall be made" by the Board, *id.* § 7101(a), an administrative body within the VA that is accountable to the Secretary. *Id.* § 7101(c). Proceedings before the Board are "ex parte in nature and nonadversarial." 38 C.F.R. § 20.700(c); *accord Sanders*, 129 S. Ct. at 1707 ("[T]he adjudicatory process is not truly adversarial, and the veteran is often unrepresented during the claims proceedings."). The Secretary thus does not appear before the Board. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 310-11 (1985) ("no Government official appears in opposition" at the VA regional office and Board).

b. *Judicial Review.* In 1988, Congress enacted the Veterans' Judicial Review Act, which for the first time provided for judicial review of final agency decisions denying disability benefits to veterans. Pub. L. No. 100-

687, 102 Stat. 4105 (Nov. 18, 1988) (codified as amended in scattered sections of 38 U.S.C.). The Act's primary purpose was to ensure that veterans, in return for their service to the country, receive all the disability benefits to which they are entitled. S. Rep. No. 100-418, at 29, 31 (1988); H.R. Rep. No. 100-963, at 13, 26 (1988).

The Act permits a veteran to challenge a final agency decision denying benefits by bringing suit in the Veterans Court, an Article I legislative court. 38 U.S.C. § 7251. The Veterans Court

> shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have the power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

Id. § 7252(a).

Section 7266(a) establishes a 120-day time limit for a veteran to commence suit against the Secretary in the Veterans Court:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

Id. § 7266(a).

c. *Appellate Review.* A veteran may appeal a Veterans Court decision to the Federal Circuit "by filing a notice of appeal with the [Veterans Court] within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts." *Id.* § 7292(a). The Federal Circuit has exclusive jurisdiction to review Veterans Court decisions. *Id.* § 7292(c).

II. Proceedings Below

a. Petitioner David L. Henderson joined the military in 1950, the year the United States entered the Korean conflict. Pet. App. 3a. He was discharged while on active duty in 1952 after being diagnosed with paranoid schizophrenia "for which he has established service connection and currently has a 100% disability rating." *Id.*

In August 2001, Henderson, unrepresented by counsel, applied to a VA regional office for special monthly compensation for in-home care related to his service-connected mental health disability. After the VA regional office denied Henderson's claim, he sought review *pro se* in the Board. On August 30, 2004, the Board issued the final decision of the Secretary denying Henderson's claim for benefits. *Id.*

b. On January 12, 2005, 135 days after the Board mailed its decision, Henderson commenced a *pro se* action against the Secretary in the Veterans Court. *Id.* The Veterans Court ordered Henderson to show cause why his case should not be dismissed for failure to comply with the 120-day time limit under Section 7266(a).

Id. at 4a. Henderson asked the Veterans Court to excuse his late filing because it resulted from the very disability for which he sought benefits—his paranoid schizophrenia which rendered him incapable of rational thought. *Id.*

At that time, the Federal Circuit had held in two en banc decisions that Section 7266(a) constituted a 120-day "statute of limitations" subject to equitable tolling. *Jaquay v. Principi*, 304 F.3d 1276, 1284 (Fed. Cir. 2002) (en banc); *accord Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc). In those cases, the court of appeals determined that the government failed to overcome the presumption of *Irwin*, 498 U.S. at 95-96, that statutes of limitations for suits against the government are subject to equitable tolling. *Jaquay*, 304 F.3d at 1286-89; *Bailey*, 160 F.3d at 1365-68. The Federal Circuit also had held that a veteran's mental illness may provide a basis for equitable tolling of the 120-day time limit. *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004).

On March 14, 2006, the Veterans Court in a single-judge order dismissed Henderson's *pro se* case. The court found that Henderson's "mental illness and medical impairments rendered him incapable of rational thought or deliberate decision making and unable to handle his own affairs or function in society." Pet. App. 101a. The court nonetheless refused to equitably toll the 120-day time limit on the ground that Henderson did not show that his medical condition directly caused the delay. *Id.* On October 31, 2006, the Veterans Court granted Henderson's motion for reconsideration, revoked the single-judge order, assigned the matter to

a panel for decision, and pro bono counsel entered an appearance to represent Henderson. *Id.* at 97a.

More than six months later, while the case was pending before the Veterans Court panel, this Court in *Bowles*, 551 U.S. at 208-09, held that the time limits in Federal Rule of Appellate Procedure 4 and 28 U.S.C. § 2107(a) are "jurisdictional." On August 3, 2007, the Veterans Court directed Henderson and the Secretary to submit supplemental memoranda addressing *Bowles*'s "effect, if any . . . on the line of cases currently allowing for equitable tolling of the time limitations prescribed for filing an appeal under 38 U.S.C. § 7266(a)." Pet. App. 94a.

In July 2008, a divided panel of the Veterans Court dismissed Henderson's case for lack of jurisdiction. *Id.* at 74a-83a. The majority concluded that under *Bowles*, Section 7266(a)'s 120-day time limit is a jurisdictional deadline and thus not subject to equitable tolling. *Id.* at 76a-82a. Judge Schoelen dissented, arguing that *Bowles* did not cast doubt on the Federal Circuit's en banc decisions in *Bailey* and *Jaquay*. *Id.* at 84a-92a.

c. Following argument before a panel of the Federal Circuit, the court of appeals *sua sponte* ordered rehearing en banc "to determine whether, in light of *Bowles*, [the court of appeals] should overrule *Bailey* and *Jaquay*." *Id.* at 2a.[1] On December 17, 2009, a divided court answered that question in the

1. Five veterans groups filed *amicus* briefs in support of Henderson. *See Henderson v. Shinseki*, 589 F.3d 1201, 1202 (2009).

affirmative, overturned *Bailey* and *Jaquay*, and affirmed the dismissal of Henderson's Veterans Court action for lack of jurisdiction. *Id.* at 1a-73a.

i. The majority set out its understanding of the governing legal framework: "In *Bowles*, the Supreme Court 'ma[d]e clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.'" *Id.* at 25a (quoting *Bowles*, 551 U.S. at 214). The majority reasoned that "Section 7266(a) is a notice of appeal, or time of review, provision in a civil case." *Id.* The majority thus held that, "in line with *Bowles*, . . . because [Section] 7266(a) is a time of review provision, it is jurisdictional and . . . because Congress has not so provided, the statute is not subject to equitable tolling." *Id.*

The majority acknowledged "that Mr. Henderson's appeal to the Veterans Court represented the first time he could appear before a court." *Id.* at 26a. It nonetheless concluded that the 120-day time limit for instituting suit was not a statute of limitations because proceedings before the Veterans Court share "characteristics of appellate review." *Id.* at 27a. The majority pointed to Section 7266(a)'s title, "Notice of Appeal," and the fact that the veteran files a "notice of appeal" to obtain "review" of the agency's denial of benefits. *Id.* at 26a-27a (quoting 38 U.S.C. § 7266(a)). The majority also reasoned that the Veterans Court "*review*[*s*]" the Board's decision; applies a clearly-erroneous standard to the facts; is restricted to the record before the agency; considers the rule of prejudicial error; and can only reverse, modify, or affirm the agency's decision. *Id.* (quoting 38 U.S.C. § 7252(a)).

Based on the above considerations, the majority declined to apply the presumption of *Irwin* that time limits for suing the government are subject to equitable tolling. The majority reasoned that *Bowles* had reversed *Irwin*'s presumption with respect to suits involving judicial review of agency action:

> The critical point is that, whereas in *Bailey* we relied on *Irwin* to conclude that time of review provisions are subject to equitable tolling unless Congress has expressed a contrary intent, *see* 160 F.3d at 1365-66, in *Bowles* the Court reached the conclusion that because time of review provisions are mandatory and jurisdictional, they *are not* subject to equitable tolling unless Congress so provides, *see* 551 U.S. at 212-13.

Pet. App. 33a-34a.

ii. Judge Dyk, joined by Judges Gajarsa and Moore, concurred, writing separately to express the view that "the rigid deadline of the existing statute can and does lead to unfairness . . . particularly . . . in the many cases where the veteran is not represented by counsel during the process at the Veterans Administration and/or is suffering from a mental disability." *Id.* at 44a. Judge Dyk observed that "these circumstances can make it extremely difficult for the veteran to navigate the system and meet the statutory deadline." *Id.*

iii. Judge Mayer, joined by Chief Judge Michel and Judge Newman, filed a vigorous dissent. *Id.* at 46a-73a.

The dissent explained that "the majority's eradication of equitable tolling creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." *Id.* at 46a. In other words, "the veteran who incurs the most devastating service-connected injury . . . will be both 'out of luck and out of court,' since failure to comply with the 120-day deadline prescribed in 38 U.S.C. § 7266(a) means that he forfeits all right to judicial review of his claim." Pet. App. 46a-47a.

The dissent explained that the majority erred in departing from the Federal Circuit's long-settled view that Section 7266(a) is a statute of limitations subject to equitable tolling. *Id.* at 47a-48a. The dissent reasoned that the prior cases were dictated by *Bowen v. City of New York*, 476 U.S. 467 (1986), which unanimously held that the deadline for seeking judicial review of an agency denial of social security benefits was a limitations period, and by *Irwin*, 498 U.S. at 95-97, which held that the time limit for challenging an adverse decision by the Equal Employment Opportunity Commission (EEOC) was a limitations period. Pet. App. 52a-53a.

The dissent also criticized the majority for relying on *Bowles*, which the dissent described as a "flimsy foundation" "for casting aside [the court's] long-established equitable tolling jurisprudence." *Id.* at 47a-48a. Finally, the dissent explained that the plain language and legislative history of Section 7266(a) show that Congress did not intend to create a jurisdictional bar immune from the doctrine of equitable tolling. *Id.* at 58a-61a, 66a-68a.

REASONS FOR GRANTING THE PETITION

Whether the Veterans Court is foreclosed under any circumstances from tolling the time limit for filing suit against the Secretary to challenge a disability benefit denial is a recurring issue that is important to the administration of the veterans disability benefits program. Because many veterans, like petitioner, have a disability that prevents them from meeting the statutory time limit for bringing suit, the Federal Circuit's decision frequently will bar veterans from obtaining even one level of judicial review. Indeed, the Veterans Court already has dismissed over two hundred cases brought by veterans based on this case.

Beyond the critical importance to disabled veterans nationwide, the Federal Circuit manifestly erred in holding that the time limit in Section 7266(a) limits the *jurisdiction* of the Veterans Court. The statutory text, structure, and purpose all compel the conclusion that Section 7266(a)'s time limit constitutes a statute of limitations for bringing suit against the government. Under the default rule of *Irwin*, the 120-day time limit is subject to equitable tolling.

This Court's unanimous decision in *Bowen*, 476 U.S. 467, confirms the court of appeals' fundamental error. *Bowen* holds that the statutory time limit governing appeal of an agency denial of social security disability benefits is subject to equitable tolling. The social security disability benefits scheme is identical in all relevant respects to the scheme for veterans disability benefits. There is no reasoned basis to permit equitable tolling for social security claimants but bar equitable

tolling for *veterans* who similarly seek review of an agency denial of disability benefits.

The majority's dispositive reliance on *Bowles* is flawed at every turn: a veteran's commencement of a suit to challenge an adverse final agency decision is markedly unlike the court-to-court appeal at issue in *Bowles*. *Bowles* does not mention *Irwin* or *Bowen*, much less cast doubt on the continuing validity of those precedents. The Federal Circuit's serious misreading of *Bowles* calls out for correction by this Court.

A. The Question Presented Is Recurring and Important

This case presents a recurring and important issue with far-reaching implications for a nationwide program that provides benefits to millions of disabled veterans. Allowed to stand, it will result in the denial of benefits to countless veterans who have meritorious disability claims.

1. Because the Federal Circuit has exclusive jurisdiction to review decisions of the Veterans Court, 38 U.S.C. § 7292(c), no circuit conflict can arise on the issue of whether equitable tolling is available under Section 7266(a). The decision below has nationwide effect and, if uncorrected by this Court, will bar many veterans from obtaining judicial review of benefit denials.

Congress and the Executive Branch have recognized the Nation's core commitment to caring for disabled veterans.[2] And this Court traditionally grants review in cases involving important questions related to the administration of the VA program. *See, e.g.*, *Sanders*, 129 S. Ct. at 1704 (reviewing prejudicial error standard applied in Veterans Court cases); *Brown v. Gardner*, 513 U.S. 115, 116 (1994) (reviewing VA regulation requiring proof by claimant that VA's negligent treatment caused disability).

2. The question presented in this case has a direct and immediate impact on the ability of disabled veterans to obtain disability benefits. There are 23 million

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2. Legislation providing relief to disabled veterans

> has been traced to Elizabethan England and a statute providing pensions to veterans who had served since 1588, the year of the Spanish Armada. The American colonies continued this tradition of providing pensions to maimed and disabled soldiers, and shortly after the Declaration of Independence, the Continental Congress promised to provide pensions to those disabled in the cause of American independence.

H.R. Rep. No. 100-963, at 9 (1988) (citation omitted); *see Brown*, 513 U.S. at 309. The President also recently remarked at Arlington National Cemetery in honor of Veterans Day: "To all our wounded warriors, and to the families who laid a loved one to rest. America will not let you down. We will take care of our own." Remarks by the President at Arlington National Cemetery (Nov. 11, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-veterans-day-arlington-national-cemetery (last visited Feb. 16, 2010).

veterans in the United States and Puerto Rico,[3] and the VA currently provides disability benefits to almost 4 million veterans and their dependents.[4] In 2009 alone, the VA received more than 1 million applications for such benefits.[5] Each year, veterans file thousands of Veterans Court cases challenging the VA's denial of benefits.[6] Most veterans who file suit against the Secretary in Veterans Court—between 53 and 70 percent annually since 2000—do so *pro se*. *See* Veterans Ct. Rept., *supra* n.6, at 1.

In the overwhelming majority of Veterans Court cases, the veteran prevails. Since 2001, veterans on average have prevailed at least in part in *80 percent* of the cases decided on the merits. *Id.*[7] That dramatic statistic demonstrates that Veterans Court review is critical to ensuring, as Congress intended, that veterans receive the benefits to

3. U.S. Dep't of Veterans Affairs, *FY 2011 Budget Submission, Vol. 1: Summary Vol.* at 1E-1 (2010), *available at* http://www4.va.gov/budget/docs/summary/Fy2011_Volume_1-Summary_Volume.pdf.

4. U.S. Dep't of Veterans Affairs, *FY 2009 Performance and Accountability Report, Executive Summary* (2009), *available at* http://www4.va.gov/budget/docs/report/FY2009-VAPAR_Executive_Summary.pdf.

5. *Id.*

6. Court of Appeals for Veterans Claims, *Annual Reports* (2000-2009) ("Veterans Ct. Rept."), *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf.

7. In 2001, veterans prevailed in whole or in part in 96 percent of Veterans Court cases decided on the merits; in 2002, 72 percent; in 2003, 91 percent; in 2004, 84 percent; in 2005, 73 percent; in 2006, 76 percent; in 2007, 64 percent; in 2008, 79 percent; and in 2009, 81 percent. Veterans Ct. Rept., *supra* n.6, at 1.

which they are entitled. Further, many of the remands are on joint motion of the parties,[8] including where the government concedes administrative error.[9] Along the same vein, the Veterans Court awards the veteran attorneys fees *more than 50 percent of the time* because the government's position was not "substantially justified" (28 U.S.C. § 2412(d)(1)(A)). Veterans Ct. Rept., *supra* n.6, at 1. By abolishing equitable tolling, the decision below denies veterans review of an erroneous decision, even where the Secretary would otherwise concede error and would be required to pay attorneys fees.

The practical import of the decision below, then, is that the courthouse doors will be shut to untold numbers of veterans with otherwise meritorious benefits claims if they miss the time limit even by one day through no fault of their own. This is particularly the case for veterans like Henderson suffering "the most devastating service-connected injur[ies]," who often are "the least able to comply with rigidly enforced filing deadlines." Pet. App. 46a (Mayer, J., dissenting). Indeed, a Westlaw search reveals that since August 14, 2008, when the Veterans Court first held that *Bowles* required the elimination of equitable tolling under Section 7266(a), that court has

8. *See Battling the Backlog, Part II: Challenges Facing the U.S. Court of Appeals for Veterans' Claims: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 89-90 (2006) (statement of Randall Campbell, Assistant General Counsel, Professional Staff Group VII, Department of Veterans Affairs), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:29716.pdf.

9. *See, e.g., Howard v. Shinseki*, No. 08-3606E, 2010 WL 318531, at *2 (Vet. App. Jan. 28, 2010); *Bartlett v. Nicholson*, 21 Vet. App. 415, 2006 WL 3200849, at *2 (Sept. 8, 2006); *Zuberi v. Nicholson*, 19 Vet. App. 541, 546-47 (2006).

dismissed at least 226 cases as untimely. Even in the short time since the Federal Circuit's decision on December 17, 2009, the Veterans Court has dismissed at least 31 cases as untimely.

3. The import of this case is further highlighted by the United States's position in an analogous case involving veterans' claims. The United States urged this Court to grant review of the Federal Circuit's decision in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir.) (en banc), *cert. denied*, 552 U.S. 948 (2007). *Kirkendall* held that equitable tolling is available under the statutory time limit to file a veterans-preference claim with the Merit Systems Protection Board (MSPB) under the Veterans Employment Opportunities Act of 1998 (VEOA). *Id.* at 833. The government requested that the Court grant, vacate, and remand in light of *Bowles* or, in the alternative, grant plenary review. Petition for a Writ of Certiorari, *Dep't of the Army v. Kirkendall*, 552 U.S. 948 (2007) (No. 07-19).

The government argued that the case warranted this Court's review because (1) the question at issue "is a recurring one of threshold importance to the administration of the VEOA's remedial scheme"; and (2) based on the Federal Circuit's exclusive jurisdiction, "no circuit conflict will arise on the availability of equitable tolling . . . and the Federal Circuit's holding that equitable tolling is available will have nationwide effect." *Id.* at 22-23. The government also observed that the decision had already affected the administration of the statutory scheme. *Id.* at 23. Each of these reasons applies with greater force here.

Although the Court denied review in *Kirkendall*, 552 U.S. at 948, that case was significantly less worthy of review for several reasons. The Federal Circuit's decision in *Kirkendall* was in line with the pro-claimant VA scheme and recognized that the time limit for seeking MSPB review is *not* jurisdictional but rather *is* subject to equitable tolling. 479 F.3d at 842. Further, there was no opportunity for this Court to review the Federal Circuit's reading of *Bowles* because *Kirkendall* was decided before *Bowles*. Counsel for the veteran also argued that *Kirkendall* was an interlocutory decision that involved a relatively small number of veterans whose requests for review occupied an insignificant portion of the MSPB's docket. *See* Brief in Opposition at 18, 19-20, *Kirkendall*, 552 U.S. 948 (No. 07-19).

By contrast, the Federal Circuit in this case effected a drastic change in the *status quo* by holding that *Bowles required* the reversal of two prior en banc decisions. Here, the decision is final and involves a benefits program that affects an exponentially larger group of veterans. Further, because *Kirkendall* relied on *Bailey*, one of the decisions overruled in this case, the court of appeals likely will extend *Bowles* to the VEOA context, such that veterans whose severe disabilities prevent a timely filing will be denied review of both disability benefits and employment preferences. Accordingly, if the government viewed *Kirkendall* as worthy of this Court's review, *a fortiori*, the question presented in this case warrants review. Any change of heart by the government now would be a heads-I-win-tails-you-lose slap in the face to the disabled veterans who suffer injuries while serving this Nation.

B. The Federal Circuit's Decision Is Wrong

This Court has long recognized the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (citing *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 285 (1946)). Thus, "interpretive doubt is to be resolved in the veteran's favor." *Brown*, 513 U.S. at 117-18; *see Sanders*, 129 S. Ct. at 1707 ("[W]e recognize that Congress has expressed special solicitude for the veterans' cause."); *id.* at 1709 (Souter, J., dissenting) (noting "Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions").

The pro-veteran canon of construction applies with full force to Section 7266(a). "The basic purpose of [the Veterans' Judicial Review Act] is to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled." S. Rep. No. 100-418, at 29. "The [Act] is designed to serve that purpose by providing such claimants with an opportunity for judicial review of final decisions of the Board of Veterans' Appeals (BVA) denying claims for benefits." *Id.*; *see id.* at 31 ("This legislation is designed to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from the VA every benefit and service to which he or she is entitled under law."); H.R. Rep. No. 100-963, at 13 (expressing congressional intent "to maintain a beneficial non-adversarial system of veterans benefits" and "to resolve all issues by giving the claimant the benefit of any reasonable doubt").

With the pro-veteran canon and statutory purpose in mind, Section 7266(a) cannot be read to impose a jurisdictional deadline. Rather, the provision constitutes a 120-day statute of limitations for a veteran to bring suit against the United States. As such, the limitations period may be equitably tolled under the presumptive rule of *Irwin*, 498 U.S. at 95-96.

1. Section 7266(a) is a statute of limitations for bringing suit against the Secretary for veterans benefits

Section 7266(a) provides:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

Four features of the statute confirm that Section 7266(a) is a statute of limitations. *First*, Section 7266(a) establishes the time limit for a veteran to *commence* a civil action against the Secretary. A time limit for bringing a court action in the first instance is naturally viewed as a statute of limitations. *See Black's Law Dictionary* 1546 (9th ed. 2009) (defining "statute of limitations" as "a statute establishing a time limit for suing in a civil case"). As the Federal Circuit explained in *Jaquay*, "the filing of a notice of appeal at the Veterans Court, like the filing of a complaint in trial court, is the

first action taken by a veteran in a court of law." 304 F.3d at 1286. Even the majority below recognized that Henderson's "appeal to the Veterans Court represented the first time he could appear before a court." Pet. App. 26a. By contrast, "[i]n the veterans' adjudicatory system, an appeal from the Veterans Court to [the Federal Circuit] is the procedural equivalent of an appeal from a district court to a court of appeals." *Id.* at 51a (Mayer, J., dissenting).

Second, the text of Section 7266(a) limits the action a *veteran* must take to file suit. The text does not express any limit on the jurisdiction or power of the Veterans Court. 38 U.S.C. § 7266(a) ("a person . . . shall file"). Absent any text reflecting a restriction on the court's jurisdiction, the pro-veteran canon of construction alone requires interpreting the provision as establishing a limitations period. *See Kirkendall*, 479 F.3d at 843 ("Even if this were a close case . . . the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that [a statutory time limit] is subject to equitable tolling.").

Third, the statutory structure reflects that Congress did not intend the 120-day time limit to operate as a restriction on the jurisdiction of the Veterans Court. Section 7266(a) does not appear in the subchapter that establishes and confines the Veterans Court's jurisdiction. Title 38, chapter 72 of the United States Code establishes the Veterans Court. Subchapter I, entitled "Organization and Jurisdiction," includes the jurisdictional prerequisites for filing in Veterans Court. In particular, Section 7252, entitled "Jurisdiction; finality of decisions," states that the Veterans Court has

"exclusive jurisdiction to review decisions of the [Board]." 38 U.S.C. § 7252(a).

By contrast, Congress placed Section 7266(a) in the subchapter describing "Procedure" for the Veterans Court. That subchapter contains provisions on "Rules of practice and procedure," *id.* § 7264, and other housekeeping matters. *E.g.*, *id.* §§ 7261-7269. The placement of Section 7266(a) in the subchapter dealing with "procedure" is consistent with the Federal Circuit's pre-*Bowles* precedent that the 120-day time limit is a "statute of limitations." *Jaquay*, 304 F.3d at 1288-89; *cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (describing "statutes of limitations" as among the "procedural requirements for triggering the right to an adjudication").

Fourth, Congress's purpose in enacting the provision was to ensure that veterans could obtain judicial review of benefit denials. S. Rep. No. 100-418 at 29, 31; H.R. Rep. No. 100-963 at 13, 26. The decision below defeats that purpose. Indeed, an inflexible jurisdictional bar to initial court review—one that denies veterans with meritorious claims any opportunity to be heard in any court—would be a uniquely anti-veteran provision within an otherwise pro-veteran statutory scheme. The Federal Circuit's interpretation would prevent *all* veterans in *all* cases from obtaining equitable tolling of the 120-day time limit, regardless of circumstances. Pet. App. 33a-34a. For instance, the court's rule would apply even where, as here, the condition preventing a veteran from filing within 120 days is the same disability for which the veteran seeks benefits, *id.*, or even where the VA affirmatively

misleads the veterans as to the filing deadline, *Bailey*, 160 F.3d at 1361-62. Congress could not have intended those results.

2. The court of appeals' decision conflicts with *Bowen* and *Irwin*

a. In *Bowen*, 476 U.S. at 478-81, this Court unanimously held that equitable tolling is available under the statutory time limit for seeking judicial review of a final agency decision denying a claim for social security disability benefits. That statute, 42 U.S.C. 405(g), is in all material respects identical to Section 7266(a):

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a *review* of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

42 U.S.C. § 405(g) (emphasis added). Section 405(g) by its plain terms is "a time of review provision." Pet. App. 25a. The majority's holding that "because [Section] 7266(a) is a time of review provision, it is jurisdictional," *id.*, directly conflicts with *Bowen*'s holding that a time of review provision for agency action denying disability benefits is *not* jurisdictional.

Moreover, Section 405(g), like Section 7266(a), addresses the action a claimant must take and is not framed as a limit on the reviewing court's jurisdiction. Both time limits, moreover, appear in statutory provisions addressed to "procedure" rather than to the court's jurisdiction. 42 U.S.C. § 405 (entitled, "Evidence, procedure, and certification for payments"); 38 U.S.C. § 7266 (appearing in subchapter of statutory scheme governing Veterans Court entitled "Procedure.").[10]

The government in *Bowen* argued, as in this case, that equitable tolling was unavailable because Section 405(g) "sets the bounds of the [reviewing court's] jurisdiction." *Bowen*, 476 U.S. at 478. This Court rejected that argument, holding that "the 60-day requirement is not jurisdictional, but rather constitutes a period of limitations." *Id.* The Court explained that equitable tolling was "consistent with Congress' intent in enacting [the] particular statutory scheme" for providing social security disability benefits to eligible claimants. *Id.* at 479. The Court also reasoned that "Congress designed [the statutory scheme for social security disability benefits] to be 'unusually protective' of claimants." *Id.* at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)). The same is true here.

There is no basis to conclude that the time limit for seeking judicial review of an agency denial of social security benefits is a limitations period, but that the time

10. After holding that Section 405(g) is a statute of limitations, *Bowen* observed that the Secretary's ability to extend the limit was consistent with congressional intent to permit equitable tolling. 476 U.S. at 476, 480.

limit for seeking judicial review of an agency denial of veterans benefits is jurisdictional. Congress, rather, created the Veterans Court to provide judicial review to *eliminate* "unwarranted distinctions that exist between protections accorded to veterans and claimants for Federal benefits from other agencies." S. Rep. No. 100-418 at 31.

The social security and veterans' disability benefits programs share a "marked similarity." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). Both programs involve claims for federal disability benefits, and both administrative processes are non-adversarial and pro-claimant. *Compare Sanders*, 129 S. Ct. at 1707 ("[T]he adjudicatory process is not truly adversarial, and the veteran is often unrepresented during the claims proceedings") *with Sims v. Apfel*, 530 U.S. 103, 107 (2000) ("[T]he SSA 'conduct[s] the administrative review process in an informal, nonadversary manner.'" (citations omitted)). Indeed, the government itself recently relied on the similarity between the two schemes in arguing to this Court that "[t]here is no reason to apply a different rule" for veterans and social security disability claimants. Brief for the Petitioner at 25, *Sanders*, 129 S. Ct. 1696 (2009) (No. 07-1209) (rule of prejudicial error).[11]

11. The veterans' scheme is nothing like the adversarial immigration scheme at issue in *Stone v. INS*, 514 U.S. 386 (1995), a decision cited by the majority. Pet. App. 14a, 26a. *Stone* stated that the time limit for an undocumented alien to challenge a civil deportation order in a circuit court of appeals was jurisdictional. 514 U.S. at 405-06. A veteran, however, does not challenge the agency's decision in the court of appeals but does

(Cont'd)

b. The majority's decision is also inconsistent with *Irwin*, 498 U.S. at 95-96, which held that a veteran, following the EEOC's denial of a discrimination claim, may be excused under the doctrine of equitable tolling from the "statutory time limit" for suing the VA. In holding that the deadline was a statute of limitations subject to equitable tolling, the Court expressly relied on *Bowen*. *Irwin*, 498 U.S. at 94. The statutory schemes in *Irwin*, in *Bowen*, and here are functionally parallel. The statutory provision in each instance specifies the time limit for filing an initial claim in court and therefore acts as a restriction on an individual's claim, not on the jurisdiction of the court. Furthermore, *Irwin* held that statutes of limitations in suits against the government are presumptively subject to equitable tolling. *Id.* at 95-96. The Federal Circuit's rule in this case turns that presumption on its head by imposing a uniquely anti-veteran rule that would require Congress expressly to authorize courts to apply equitable tolling when veterans bring suit against the United States. Pet. App. 29a-30a; *cf. id.* at 44a-45a (Dyk, J., concurring) (expressing view that it was Congress's responsibility to amend the statute).

It would be highly incongruous to excuse veterans under equitable circumstances from the time requirements for bringing employment actions under

(Cont'd)

so in the Veterans Court, whose decision is then subject to further review by the court of appeals. Moreover, this case, like the social security context, involves denial of a benefit. It is implausible that Congress intended to treat a disabled veteran seeking a benefit like an undocumented alien facing deportation. Pet. App. 53a-54a (Mayer, J., dissenting).

Title VII against the Secretary, *Irwin*, 498 U.S. at 95-96, yet hold them to an unyielding deadline for initiating suit under a statutory scheme created with pro-veteran intentions. This Court's review is warranted to correct the Federal Circuit's subversion of Congress's intent.

3. *Bowles* is inapposite

Bowles held that the time limits in Federal Rule of Appellate Procedure ("Rule") 4 and 28 U.S.C. § 2107(a) for a litigant to appeal a federal district court judgment to a circuit court of appeals are "jurisdictional" and thus not subject to extension based on equitable circumstances. *Bowles*, 551 U.S. at 209. The Federal Circuit held that *Bowles* announced a *per se* rule that any "appellate" deadline in any civil case is jurisdictional when it stated that "[t]oday we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." Pet. App. 33a-34a (quoting *Bowles*, 551 U.S. at 214). The majority reasoned that because the veteran brings a civil suit by filing a "notice of appeal" in the Veterans Court, which "reviews" agency action, Section 7266(a) is a "time of review" provision that under *Bowles* is jurisdictional. *Id.* at 25a. The majority likewise agreed with the government that Section 7266(a) "is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the lower court or tribunal ends and that of the appellate court begins." *Id.* at 23a-24a.

a. The majority wrenched the quoted passage from *Bowles* out of context and woodenly extended the passage to the veterans context as if it were a statute. But this Court does not "parse the text" of its opinions

"as though that were itself the governing statute." *Comm'r v. Bollinger*, 485 U.S. 340, 349 (1988); *see Nevada v. Hicks*, 533 U.S. 353, 372 (2001). Not surprisingly, the majority's logic breaks down at each level of the analysis, because there is a world of difference between an appeal from a district court to a circuit court of appeals, and an *initial suit* against the government in the *pro-veteran* context.

First, the Board acting for the Secretary is not a lower court or even a court at all. To the contrary, the entire administrative claims process, including at the Board, is non-adversarial. *Walters*, 473 U.S. at 309-12; 38 C.F.R. § 20.700(c). By contrast, district court proceedings are adversarial. Pet. App. 72a-73a (Mayer, J., dissenting) ("So while Bowles, a convicted murderer, had several opportunities to present his case in a court of law, Henderson will have none.").

This Court has specifically "warned against reflexively 'assimilating the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts.'" *Sims*, 530 U.S. at 110 (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940)); *accord id.* ("'[I]t is well settled that there are wide differences between administrative agencies and courts.'" (quoting *Shepard v. NLRB*, 459 U.S. 344, 351 (1983)). Yet the majority reflexively treated the Board within the agency as a lower "tribunal" whose "jurisdiction" is divested when a case is "transfer[red]" to the Veterans Court. Pet. App. 23a-24a, 37a. The Board is functionally identical to the Appeals Council (or an ALJ) that makes a final decision denying social security benefits, *Sims*, 530 U.S. at 105, and the EEOC that makes a final

decision rejecting a federal employee's discrimination claim, 29 C.F.R. §§ 1614.405, 1614.407(c). In all of those instances the litigant's suit simply takes the matter out of an agency; the suit does not transform the agency into a lower court.

Second, a veteran who initiates suit in the Veterans Court appears for the first time in court against the Secretary—the first adversarial proceeding in the veteran's pursuit of benefits. The Veterans Court thus operates more like the district court in *Bowen* and *Irwin* than the circuit court of appeals at issue in *Bowles*. Pet. App. 54a-55a (Mayer, J., dissenting). Indeed, the notice to challenge the Board's decision under Section 7266(a) is filed *in the Veterans Court*, 38 U.S.C. § 7266(a), reflecting that the notice operates as a complaint. *Compare* Rule 4(a)(1)(A) (to challenge a district court decision, the notice of appeal is filed in the district court).

The Veterans Court's 80 percent combined reversal and remand rate for Board's decisions (p. 14, *supra*) further illustrates that the Veterans Court does not function like a circuit court of appeals. The combined reversal and remand rate of the circuit courts for district court decisions is typically between 12 percent and 16 percent.[12] And by equating an initial request for judicial review of agency action with a traditional circuit court appeal, the majority's decision creates another anomaly: although Section 7252(a) creates a cause of action for judicial review of a final agency decision denying

12. Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts*, at table B-5 (2000-2008), *available at* http://www.uscourts.gov/judbususc/judbus.html.

disability benefits, the decision below leaves no room for any statute of limitations for that claim. *Bowen* held that Section 405(g)'s time limit for seeking judicial review of the denial of social security benefits is not jurisdictional and therefore refutes the court of appeals' holding that *Bowles* renders all "time of review" provisions jurisdictional. Pet. App. 25a.

Third, the majority's opinion erroneously elevates form over substance by placing talismanic significance on the word "appeal" in the text and title of Section 7266(a). A veteran appeals the Board's decision not in a jurisdictional sense, but in the sense of challenging the Secretary's decision in court. That situation is no different than when a social security claimant appeals the Commissioner's disability benefits denial by filing suit in district court. *See, e.g.*, *Torres v. Barnhart*, 417 F.3d 276, 283 (2d Cir. 2005) (an "appeal of Commissioner's final decision must be filed within 60 days"); *Snyder v. Barnhart*, 212 F. Supp. 2d 172, 174 (W.D.N.Y. 2002) ("This is an action brought pursuant to 42 U.S.C. § 405(g) in appeal of the [Commissioner's] final decision."). This Court likewise has used the term "appeal" as meaning a challenge. *Heckler*, 467 U.S. at 107 ("[I]f the claimant is dissatisfied with the decision of the ALJ, he may take an *appeal* to the Appeals council of [HHS]." (emphasis added)).

Congress's use of the term "appeal" in other provisions of the statute confirms its non-jurisdictional meaning. Congress repeatedly employed the terms "appeal," "appellate review," and "appellant" in the layman's sense to refer to a veteran's non-adversarial

request for review within the agency. *See, e.g.*, 38 U.S.C. §§ 7104(a) (Board hears "appeals" of regional office decisions); 7105(a) ("appellate review" is initiated before Board); 7106 ("right of review of appeal" before Board); 7107(d)(1) (veteran is "appellant" before Board even though Secretary does not appear); 7108 (referring to "an application for review on appeal" before Board). Similarly, the name of the Board of Veterans' Appeals likely conveys that the Board decides challenges to initial agency denials of disability benefits.

Because Congress established the administrative benefits process to be pro-veteran and non-adversarial, and expected veterans to navigate the process without legal representation, *Sanders*, 129 S. Ct. at 1707, it strains credulity to conclude that Congress intended the word "appeal" in this context to have the formal jurisdictional significance as in 28 U.S.C. § 2107(a) and Rule 4.

The Federal Circuit finally erred in relying on the "characteristics of appellate review" in Veterans Court proceedings. Pet. App. 27a. The majority pointed to the deferential standard of review applied by the Veterans Court. *Id.* at 27a-28a. That standard, however, merely reflects Congress's desire that the court defer to the agency in certain circumstances. It does not mean that Congress intended the 120-day time limit to be jurisdictional. Indeed, the same standard of judicial review applies in the social security context. 42 U.S.C. § 405(g) ("The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner . . . The findings of the Commissioner . . .

as to any fact, if supported by substantial evidence, shall be conclusive"); *see also* Brief for the Petitioner at 25, *Sanders*, 129 S. Ct. 1696 (No. 07-1209) (setting forth social security rule of prejudicial error).

b. There is also an important textual distinction between Section 7266(a) and Section 2107(a). Section 7266(a) directs *the veteran* to take action and does not purport to limit the Veterans Court's power at all. By contrast, Section 2107(a)'s text limits the circuit court of appeals' power. 28 U.S.C. § 2107(a) ("no appeal shall bring any judgment . . . of a civil nature before a circuit court of appeals for review" unless a notice of appeal is filed within 30 days). Moreover, unlike Section 7266(a), Section 2107(c) specifies the precise amount of time a court may extend the filing deadline. *Bowles*, 551 U.S. at 213 ("Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple 'claim-processing rule.'").

c. *Bowles* is also inapposite because the Court relied on the "longstanding treatment"—dating to the mid-nineteenth century—of time limits for a traditional appeal from a district court as "jurisdictional" in nature. *Bowles*, 551 U.S. at 209-10 (citations omitted). There is no comparable tradition for statutory time limits on seeking judicial review of non-adversarial administrative decisions that are the product of a uniquely pro-claimant statutory scheme. To the contrary, for more than two decades this Court has held that such time limits are non-jurisdictional and subject to equitable tolling. *Bowen*, 476 U.S. at 478. And for over a decade, the Federal Circuit agreed. *Jaquay*, 304 F.3d at 1285-89; *Bailey*, 160 F.3d at 1364-68.

d. Finally, unlike *Bowles*, application of equitable tolling of the 120-day time limit under Section 7266(a) by an Article I court does not implicate any of the separation of powers concerns implicit in the federal courts' interpretation of statutes establishing their own jurisdiction. *See Bowles*, 551 U.S. at 212-13 (stating that the Court's decision "follows naturally" from the principle that "[w]ithin constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider"). Because Congress established the Veterans Court as an Article I court, there is no risk of an Article III court overstepping *its own* bounds by allowing equity to increase the cases that the Veterans Court can hear. To the contrary, depriving the Veterans Court of the power to apply equitable tolling utterly defeats Congress's pro-veteran intent in creating the Veterans Court in the first place.

* * *

The decision below drastically alters the rights of veterans to obtain judicial review of agency decisions denying benefits. "Eliminating equitable tolling deprives deserving veterans of the leniency they are due and makes a mockery of the pro-claimants adjudicatory scheme Congress intended to create." Pet. App. 73a (Mayer, J., dissenting). The doctrine of equitable tolling is particularly necessary in this context because veterans typically appear *pro se* and their disabilities may prevent a timely request for review. Only this Court can consider whether the court of appeals erroneously read this Court's decision in *Bowles* to overrule *Irwin*'s application to a veteran's suit to challenge an agency denial of disability benefits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED DECEMBER 17, 2009

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-7006

DAVID L. HENDERSON,

Claimant-Appellant,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in 05-0090, Chief Judge William P. Greene, Jr.

DECIDED: December 17, 2009

Before MICHEL, Chief Judge, NEWMAN, MAYER, LOURIE, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, PROST, and MOORE, Circuit Judges.

SCHALL, *Circuit Judge.*

This is a veterans case. It involves 38 U.S.C. § 7266(a). Pursuant to that statute, a veteran may appeal a final decision of the Board of Veterans' Appeals

("Board") to the United States Court of Appeals for Veterans Claims ("Veterans Court") within 120 days after the date on which notice of the Board's decision is mailed. In this case, veteran David L. Henderson appeals the decision of the Veterans Court which dismissed his appeal of an adverse Board decision for lack of jurisdiction, on the ground that the appeal was untimely. *Henderson v. Peake*, 22 Vet. App. 217 (2008). In arriving at its decision, the court held that the 120-day appeal period set forth in § 7266(a) is not subject to equitable tolling. It was the view of the Veterans Court that the decision of the Supreme Court in *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007), had abrogated the decision of this court in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc). In *Bailey*, we held that § 7266(a) is subject to equitable tolling. Following argument before a panel, we decided to rehear Mr. Henderson's appeal en banc, in order to determine whether, in light of *Bowles*, we should overrule *Bailey* and *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc). In *Jaquay*, we followed *Bailey* and held that the misfiling of a motion for reconsideration before the Board equitably tolls the period for filing a notice of appeal with the Veterans Court. Today, for the reasons set forth below, based on *Bowles*, we expressly overrule *Bailey* and *Jaquay's* holdings that the time period set forth in § 7266(a) is subject to equitable tolling. We therefore affirm the decision of the Veterans Court dismissing Mr. Henderson's appeal for lack of jurisdiction.

Appendix A

BACKGROUND

Mr. Henderson served on active military duty from 1950 to 1952. He was discharged in 1952 after being diagnosed with paranoid schizophrenia, for which he has established service connection and currently has a 100% disability rating. In August of 2001, Mr. Henderson filed a claim for monthly compensation with the Department of Veterans Affairs ("VA") Regional Office ("RO"), based on his need for in-home care. The RO denied the claim, and Mr. Henderson appealed to the Board. The appeal was denied on August 30, 2004. Thereafter, on January 12, 2005, Mr. Henderson filed a notice of appeal with the Veterans Court, fifteen days after the expiration of the 120-day appeal period set forth in 38 U.S.C. § 7266(a). Section 7266(a) provides as follows:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.[1]

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1. In pertinent part, § 7104(e) of Title 38 provides:

> (e)(1) After reaching a decision on a case, the Board shall promptly mail a copy of its written decision to the claimant at the last known address of the claimant.

Appendix A

In 2005, the Veterans Court entered two orders asking Mr. Henderson to explain why his appeal should not be dismissed as untimely. Mr. Henderson responded that his failure to timely appeal was a direct result of his illness, and he asked that the court allow for equitable tolling in light of *Bailey*.

In March of 2006, in a single-judge decision, the Veterans Court held that equitable tolling was inappropriate in Mr. Henderson's case, and dismissed his appeal as untimely. Subsequently, however, the court appointed pro bono representation to Mr. Henderson and revoked its initial order, reassigning the appeal to a panel. While Mr. Henderson's appeal was pending, the Supreme Court rendered its decision in *Bowles*, in which it stated that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," and thus cannot be waived. 551 U.S. at 214. The Court also stated that it had "no authority to create equitable exceptions to jurisdictional requirements." *Id.* The Veterans Court requested additional briefing on whether *Bowles* had abrogated our en banc decision in *Bailey*.

On July 24, 2008, the Veterans Court ruled in a 2 1 decision that the holding in *Bowles* prohibited it from using equitable tolling to extend the 120 day appeal period set forth in § 7266(a). *Henderson*, 22 Vet. App. at 221. The court determined that Congress had "specifically authorized" it to conduct "independent judicial *appellate review*" of the Board, and that well-settled law established that its cases were "civil actions." *Id.* at 220. Starting from that premise, the court

concluded that § 7266(a) was a notice of appeal provision in a civil case, and that it was jurisdictional and could not be equitably tolled. *Id.* at 220-21. Accordingly, the court ruled that our precedent in *Bailey* was effectively overruled, and it dismissed Mr. Henderson's appeal for lack of jurisdiction. *See id.* at 218-20 (discussing *Bailey*). Judge Schoelen dissented, stating that the majority had failed to explain how *Bowles* changed the analysis of the governmental waiver of sovereign immunity that the Federal Circuit undertook in *Bailey* and reaffirmed in Jaquay. *Id.* at 222 (Schoelen J., dissenting).

Mr. Henderson timely appealed to this court, and a panel heard oral argument on June 5, 2009. Recognizing that the case raised the question of whether *Bowles* requires or suggests that we overrule previous en banc holdings of our court, we granted rehearing en banc sua sponte on June 29, 2009. *Henderson v. Shinseki*, 327 Fed. Appx. 901, 2009 WL 1845590 (Fed. Cir. 2009). The single question posed to the en banc court is this:

> Does the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007), require or suggest that this court should overrule its decisions in *Bailey v. West*, 160 F3d 1360 (Fed. Cir. 1998) (en banc), and *Jaquay v. Principi*, 304 F3d 1276 (Fed. Cir. 2002) (en banc), holding that 38 U.S.C. § 7266 is subject to equitable tolling?

Appendix A

DISCUSSION

I.

Under 38 U.S.C. § 7292(c), we have jurisdiction "to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." Pursuant to 38 U.S.C. § 7292(d)(1), we "decide all relevant questions of law, including interpreting constitutional and statutory provisions." However, absent a constitutional issue, we "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2). As we stated in *Bailey*, "[b]ecause our review of this decision involves a question of statutory interpretation—namely the ability of the [Veterans Court] to equitably toll a particular statutory time limit and thereby exercise jurisdiction over a late-filed notice of appeal—we have jurisdiction over this matter." 160 F.3d at 1362. The question of whether § 7266(a) is subject to equitable tolling is a question of law and is reviewed de novo. *See id.*; *see also* 38 U.S.C. § 7292(d)(2).

Appendix A

II.

A.

Before turning to the contentions of the parties and our analysis, we examine *Bailey*, *Jaquay*, and *Bowles*. In *Bailey*, veteran Harold Bailey sought service connection for a pulmonary disorder. After his claim was denied by the RO, Bailey appealed to the Board, which also denied his claim. *Bailey*, 160 F.3d at 1361. The Board mailed copies of its decision to Bailey and his representative on August 8, 1996. The Board's decision informed Bailey that, under 38 U.S.C. § 7266(a), he had 120 days to appeal to the Veterans Court by filing a notice of appeal with the court at its address in Washington, D.C. *Id.*

Bailey filed his Notice of Appeal with the Veterans Court on January 25, 1997, after the expiration of the 120-day period specified in § 7266(a). *Id.* at 1361-62. Eventually, the Veterans Court dismissed the appeal for lack of jurisdiction, stating that equitable tolling was not available "to provide any relief in the case of an untimely filed [Notice of Appeal]." *Id.* at 1362. After Bailey appealed, we took the case en banc to determine whether the 120-day time period set forth in § 7266(a) is subject to equitable tolling.

The en banc court held that the time period in § 7266(a) is subject to equitable tolling. In so doing, the court "t[ook its] guidance" from *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). *Bailey*, 160 F.3d at 1363. In that case, Shirley Irwin was fired from his job with the VA.

Subsequently, he sought to bring a Title VII claim in district court after exhausting his remedies within the agency and before the Equal Employment Opportunity Commission ("EEOC"). 498 U.S. at 90-91. Section 2000e-16(c) of Title 42 provided at the time, as a statute of limitations, that a Title VII complaint had to be filed "within thirty days of receipt of notice of final action" by the EEOC.[2] *Id.* at 94. Although Irwin did not file his complaint in a timely fashion, he argued that equitable tolling should apply and excuse his delay. *Id.* at 91.

After the district court dismissed Irwin's complaint and the Fifth Circuit affirmed the dismissal, the Supreme Court granted certiorari. Deciding the case, the Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95. The Court further held that equitable tolling should apply to 42 U.S.C. § 2000e-16(c), stating that the use of equitable tolling against the government did not improperly broaden Congress's statutory waiver of sovereign immunity.[3] *Id.* at 95-96.

In *Bailey*, we viewed § 7266(a) as a time of review provision, *see* 160 F.3d at 1365-66, but we declined to cabin *Irwin* to cases involving statutes of limitations. *Id.* We stated that the Supreme Court's opinion in *Irwin*

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2. In 1991, this time period was extended to ninety days. *See* Pub. L. No. 102-166, § 114(1), 105 Stat. 1071, 1079 (Nov. 21, 1991).

3. The Court, however, found equitable tolling was inappropriate in Irwin's case.

did not "distinguish among the various kinds of time limitations that may act as conditions to the waivers of sovereign immunity required to permit a cause of action to be pitched against the United States." *Id.* at 1364. We further stated that the rule we drew from *Irwin* was that "the doctrine of equitable tolling, when available in comparable suits of private parties, is available in suits against the United States, unless Congress has expressed its intent to the contrary." *Id.* We concluded that there was "no reason to believe" that Congress wanted to bar the application of equitable tolling to § 7266(a). *Id.* at 1368.

The *Bailey* Court distinguished *Stone v. Immigration & Naturalization Service*, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995), and *Missouri v. Jenkins*, 495 U.S. 33, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990). In *Stone*, which involved a final deportation order of the Board of Immigration Appeals ("BIA"), the Supreme Court held that the time for filing a petition for review of the order with a circuit court of appeals was jurisdictional and thus could not be equitably tolled.[4] Although the *Stone* Court stated that "statutory provisions specifying the time of review" are "mandatory and jurisdictional," 514 U.S. at 405, we said in *Bailey*

4. The text of 8 U.S.C. § 1105a(a)(1) (1994), the statute at issue in *Stone*, provided that "a petition for review [of a final deportation order] may be filed not later than 90 days after the date of the issuance of the final deportation order." The statute was repealed, effective April 1, 1997, by Pub. Law No. 104-208, Div. C, Title III, § 306(b), 110 Stat. 3009-612 (Sept. 30, 1996).

that we did not think this language could "be read to mean that statutes specifying the time of review cannot be subject to equitable tolling because such statutes are mandatory and jurisdictional." *Bailey*, 160 F.3d at 1366. Rather, we said that we thought it reasonable to read this language to mean that "statutory provisions specifying the time for review are not subject to equitable tolling, after *Irwin*, if Congress has so expressed its intent." *Id.*

In *Missouri v. Jenkins*, the Supreme Court held that the ninety-day time limit for filing a petition for certiorari in a civil action, set forth in 28 U.S.C. § 2101(c), is not subject to equitable tolling.[5] 495 U.S. at 45. We stated in *Bailey* that we read *Missouri v. Jenkins* in light of *Irwin* to mean that time of review statutes cannot be equitably tolled where Congress has provided contrary intent. *Bailey*, 160 F.3d at 1367. We found that such intent was present in the case of § 2101(c) because Congress had added a sixty-day good cause exception to the ninety-day time limit in the statute. *Id.* Because Congress specifically included a good cause exception,

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5. Section 2101(c) of Title 28 provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

we stated that Congress "expressed an intent to shield the statute from equitable tolling," and thus *Missouri v. Jenkins* and *Irwin* could be harmonized. *Id.* We concluded our discussion of *Stone* and *Missouri v. Jenkins* by stating: "We recognize that language in *Stone* and *Missouri v. Jenkins* can be read to draw a bright line which would place statutes of limitation on one side of the *Irwin* presumption and statutes of timing of review on the other. We are not comfortable drawing that line . . . ." *Id.*

After analyzing § 7266(a), we concluded that the government had not rebutted the *Irwin* presumption, and that § 7266(a)'s time period was therefore subject to equitable tolling. In reaching this conclusion, we noted that Congress did not express contrary intent that would indicate equitable tolling should not apply. For example, in *United States v. Brockamp*, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997), we observed, the Supreme Court held that the statute of limitations in 26 U.S.C. § 6511 is not subject to equitable tolling because it is "set[] forth . . . in a highly detailed technical manner, that linguistically speaking, cannot easily be read as containing implicit exceptions."[6] Further, § 6511 expressly states exceptions to its time limits, and "equitable tolling" is not one of the exceptions enumerated. *Id.* at 352. We observed in addition that, in *United States v. Beggerly*, 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998), the Supreme Court found that

6. Section 6511 of Title 26 deals with the procedures for filing tax-refund claims.

Congress had rebutted the presumption of equitable tolling for 28 U.S.C. § 2409a because the statute provides for an "unusually generous" statute of limitations that "d[oes] not begin to run until the plaintiff 'knew or should have known of the claim of the United States.'"[7] 524 U.S. at 48-49. We determined that, unlike the statutes in *Brockamp* and *Beggerly*, § 7266(a) is neither highly technical nor generous, and does not provide for explicit exceptions to the limitations period it contains. Thus, we concluded that the appeal period in § 7266(a) is subject to equitable tolling, overruling prior precedent to the contrary. *Bailey*, 160 F.3d at 1368. Accordingly, we reversed the decision of the Veterans Court and remanded the case for a determination as to whether Bailey was entitled to the benefit of equitable tolling.

In concurrence, now-Chief Judge Michel wrote separately "because certain statements of our court about certain comments in *Irwin* could be read to suggest a broader application of *Irwin* to other tribunals . . . ." *Bailey*, 160 F.3d at 1368 (Michel, J., concurring). The concurrence focused on the "unique, paternalistic administrative environment" of the Veterans Court, and noted that "disputes that arise in this system are subject to procedural and other rules that are distinctly advantageous to the veteran claimant." *Id.* at 1368-69. Because Judge Michel could find no possibility for "comparable suits of private

7. Section 2409a of Title 28 addresses procedures for bringing actions for quiet title where the United States is a party.

parties" in the veterans context, he reasoned that the holding in *Irwin* was inapplicable. *Id.* at 1370. The concurrence nonetheless concluded that equitable tolling of § 7266(a)'s 120-day period was appropriate because the "entire scheme is imbued with special beneficence from a grateful sovereign." *Id.* at 1370.

Dissenting, Judge Bryson pointed out that the Federal Circuit had "previously characterized compliance with the 120-day appeal period in 38 U.S.C. § 7266(a) as 'a prerequisite for jurisdiction in the [Veterans Court],'" and that consequently the court had held that the 120-day period was not subject to extension upon a showing of good cause. *Id.* According to the dissent, the question of whether § 7266(a) is subject to equitable tolling was controlled not by *Irwin*, but by *Stone*. *Id.* at 1372. The dissent drew the bright line the majority rejected, finding that while statutes of limitations are subject to the *Irwin* presumption of equitable tolling, "[p]eriods for filing notices of appeal are not normally regarded as statutes of limitations." *Id.* at 1371. "Instead, they are considered 'timing of review' provisions, which are typically deemed 'mandatory and jurisdictional' and not subject to equitable tolling." *Id.* at 1371-72. The statute in *Irwin*, the dissent stated, was a statute of limitations because it commenced a civil suit in district court, and was not an appeal from any court or other body. *Id.* at 1372.

By contrast, the dissent stated, the statute in *Stone* specified the time for review of a decision of the BIA by

a federal court of appeals. The dissent highlighted the following language from the Court's opinion in *Stone*, *id.*:

> Judicial review provisions . . . are jurisdictional in nature and must be construed with strict fidelity to their terms. . . . This is all the more true of statutory review provisions specifying the timing of review, for those time limits are, as we have often stated, "mandatory and jurisdictional," . . . and are not subject to equitable tolling.

Stone, 514 U.S. at 405. The dissent concluded that the appeal provision in *Stone*, 8 U.S.C. § 1105a(a)(1), paralleled § 7266(a), "in that both provide a fixed period of time within which an appeal may be taken to a reviewing court." *Bailey*, 160 F.3d at 1372. By contrast, the limitations period at issue in *Irwin* is not a provision for appellate review "because the action brought in district court is not a review of anything done by the EEOC, but an original discrimination action against the employer agency." Finally, the dissent reviewed the pertinent legislative history and determined that although it was "not conclusive," it too supported the conclusion that § 7266(a) is jurisdictional in nature and not subject to equitable tolling.

Appendix A

B.

In *Jaquay*, the en banc court addressed the question of whether a misfiled motion asking for Board reconsideration "equitably tolled the judicial appeal period for filing [a] notice of appeal to the Veterans Court." 304 F.3d at 1278. Veteran Oliver Jaquay attempted to file a motion for reconsideration of a final Board decision, but incorrectly filed it with his RO. After ten months had elapsed, the RO forwarded the motion to the Board, where it was denied. When Jaquay appealed the reconsideration decision to the Veterans Court (within 120 days of the denial), the Veterans Court granted the government's motion to dismiss because the notice of appeal was not filed within 120 days of the *initial* final Board decision. Further, the Veterans Court found tolling inappropriate under *Rosler v. Derwinski*, 1 Vet. App. 241, 249 (1991), where it had held that a motion for reconsideration filed with the Board within 120 days of the Board's final decision tolls the time required to file a notice of appeal with the Veterans Court until 120 days after the reconsideration decision. *Id.* We reversed, holding that Jaquay's misfiling equitably tolled the 120-day period for filing at the Veterans Court.

We noted that, in *Irwin*, the Supreme Court stated that equitable tolling is available (1) "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period," or (2) "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. We also noted that the Supreme Court had previously found equitable tolling appropriate where a plaintiff had "filed the

correct complaint in the wrong court." *Jaquay*, 304 F.3d at 1285. We stated that, "[i]n the context of the non-adversarial, paternalistic, uniquely pro-claimant veterans' compensation system, and consistent with our decision in *Bailey*, the availability of equitable tolling pursuant to *Irwin* should be interpreted liberally with respect to filings during the non-adversarial stage of the veterans' benefits process." *Id.* at 1286. We thus held as a matter of law that "a veteran who seeks redress of a claim and misfiles his request at the same [RO] from which the claim originated" is entitled to equitable tolling under the first *Irwin* prong "despite the defective filing" because he has "actively pursued his judicial remedies." *Id.* at 1288-89.

C.

The Supreme Court decided *Bowles* in 2007, after *Bailey* and *Jaquay* were decided by this court. In *Bowles*, the Court sought to clarify the circumstances in which time limits have jurisdictional significance. In the case, Keith Bowles petitioned for *habeas corpus* relief from a murder conviction, after unsuccessfully challenging on direct appeal in state court both his conviction and sentence of fifteen years to life. 551 U.S. at 207. The district court in Ohio denied the petition, and Bowles failed to timely appeal. *Id.* Pursuant to 28 U.S.C. § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6) ("Rule 4(a)(6)"), though, the district court exercised its right to extend the period for filing

a notice of appeal.[8] *Id.* However, the court's order

8. Section 2107(c) of Title 28 provides:

> (c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—
>
> (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
>
> (2) that no party would be prejudiced,
>
> the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Rule 4(a)(6) similarly provides:

> **(6) Reopening the Time to File an Appeal**. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

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erroneously gave Bowles seventeen days to file the notice of appeal, instead of the fourteen days allowed by the statute and the rule. Bowles filed his notice of appeal on the sixteenth day. *Id.* Before the United States Court of Appeals for the Sixth Circuit, Russell, the Warden who had custody of Bowles, argued that Bowles's notice of appeal was untimely and that the court therefore lacked jurisdiction to hear the case. The Sixth Circuit agreed and dismissed the appeal. *Bowles v. Russell*, 432 F.3d 668, 677 (6th Cir. 2005). Noting that Rule 4(a) had been interpreted as "both mandatory and jurisdictional" by the Supreme Court and the Sixth Circuit, *id.* at 673, the court held that the Rule was "not susceptible to extension through mistake, courtesy, or grace." *Id.* at 669.

The Supreme Court affirmed the decision of the Sixth Circuit. Focusing on 28 U.S.C. § 2107(c), the Court held that the statute was more than a "claim processing rule," *Bowles*, 551 U.S. at 213, and stated repeatedly that time limits for filing a notice of appeal are jurisdictional in nature. *Id.* at 206, 210-212. The Court stressed the fact that it had "long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Id.* at 209. In addition, the Court

(Cont'd)

> (B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
>
> (C) the court finds that no party would be prejudiced.

emphasized that there is particular "jurisdictional significance" when the time limit is set forth statutorily, rather than through court-promulgated rules. *Id.* at 210-11. In that regard, the Court contrasted its treatment of Federal Rule of Bankruptcy Procedure 4004 ("Rule 4004"), which governs the filing deadline for a complaint objecting to a debtor's discharge, with 28 U.S.C. § 2101(c), which governs the filing deadline for a writ of certiorari in civil cases. In discussing Rule 4004, the Court recounted its decision in *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004). In *Kontrick*, the Court held that Rule 4004 was not jurisdictional. According to the *Bowles* Court, "[c]ritical to [the] analysis [in *Kontrick*] was the fact that 'no statute . . . specifies a time limit for filing a complaint objecting to the debtor's discharge.'" 551 U.S. at 211 (quoting *Kontrick*, 540 U.S. at 448). As only Congress can determine the jurisdiction of a lower federal court, the Court found it inappropriate to label rules such as Rule 4004 "jurisdictional." By contrast, referring to 28 U.S.C. § 2101(c), the Court stated: "We have repeatedly held that this statute-based filing period for civil cases is jurisdictional." *Bowles*, 551 U.S. at 212.

Continuing, the Court opined that "[j]urisdictional treatment of statutory time limits makes good sense." *Id.* at 212. "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Id.* at 212-13. Because Congress specifically

provided a limit on the number of days a court may extend the period in which to file a notice of appeal in 28 U.S.C. § 2107(c), the Court found that limit to be "more than a simple 'claim-processing rule,'" and thus jurisdictional. *Id.* at 213. The Court stated: "Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations." *Id.* In conclusion, the Court emphasized: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.* at 214. The Court added that it had "no authority to create equitable exceptions to jurisdictional requirements." *Id.* The Court thus affirmed the dismissal of Bowles's habeas appeal. *Id.* at 214-15.

III

On appeal, Mr. Henderson, supported by various amici, makes several arguments as to why *Bowles* does not require us to overrule *Bailey* and *Jaquay*.[9] He first contends that 38 U.S.C. § 7266(a) is analogous to a statute of limitations rather than a jurisdictional time

9 We received amicus curiae briefs from veteran Allan G. Halseth; Disabled American Veterans ("DAM"); National Organization of Veterans' Advocates, Inc. ("NOVA"); Paralyzed Veterans of America and the Jewish War Veterans of the United States of America ("PVA/JWV"); and United Spinal Association ("United Spinal"), all urging reversal of the decision of the Veterans Court.

of review provision. Starting from that premise, he argues that the question of whether the 120-day filing period in § 7266(a) is subject to equitable tolling is governed by *Irwin*. Mr. Henderson urges that, in any event, the *Bowles* analysis should be limited to appeals in Article III courts, and should not be extended to cover appeals to the Article I Veterans Court. Finally, Mr. Henderson points to the unique pro-claimant, non-adversarial nature of proceedings before the RO and the Board. According to Mr. Henderson, the unique nature of veterans proceedings supports a reading of § 7266(a) that allows for equitable tolling.

In arguing that § 7266(a) is analogous to a statute of limitations, rather than a time of review provision, and that *Irwin* therefore controls, Mr. Henderson points to *Jaquay*. There, we stated that "the filing of a notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first action taken by a veteran in a court of law." 304 F.3d at 1286. He also points to the statement in *Jaquay* that *Bailey* decided "whether the 120-day *statute of limitations* under 38 U.S.C. § 7266 was subject to the doctrine of equitable tolling." Appellant's Br. 19 (quoting *Jaquay*, 304 F.3d at 1283). According to Mr. Henderson, "[t]he rationale for these statements is simple: when a veteran files [a Notice of Appeal] in the Veterans Court, the veteran is *commencing* litigation against the United States, *not* pursuing an appeal from one Article III court to another." *Id.*

Mr. Henderson argues that the title of § 7266(a), "Notice of Appeal," does not change the fact that the statute constitutes a statute of limitations. Mr. Henderson reasons that although a case has been through several non-adversarial administrative proceedings when it reaches the Veterans Court, it has not yet been heard in a court of law. By contrast, an appeal from a district court to a circuit court of appeals already has been heard in one Article III court. *See Bowles*, 551 US at 208-09 (discussing the time limit for seeking review of an Article III court's decision in another Article III court). In other words, Mr. Henderson contends that § 7266(a) must be a statute of limitations because he "has not had a chance to engage the judicial machinery" before the time of his appeal to the Veterans Court. *See* En Banc Oral Arg., 14:19-14:22, Sept. 18, 2009.

According to Mr. Henderson, because § 7266(a) is analogous to a statute of limitations provision, the *Irwin* presumption in favor of equitable tolling applies. In that regard, he argues that, as we determined in *Bailey*, there is no evidence of congressional intent to foreclose the application of equitable tolling to § 7266(a). Mr. Henderson posits that where Congress has written in exceptions to a time period set forth in a statute, as it did in 28 U.S.C. § 2107(c), then the specified time period cannot be equitably tolled. However, in the case of § 7266(a), no such exception was written in. Thus, Mr. Henderson contends that "equitable tolling is presumed to exist in the statute." *Id.* at 6:04 08. Relatedly, Mr. Henderson urges that the intent to provide for equitable tolling has been solidified in the past eleven years. In

the period since *Bailey*, Congress has amended § 7266(a), and chosen not to specify that equitable tolling is unavailable, indicating to Mr. Henderson that Congress has acquiesced in the interpretation we gave the statute in *Bailey*.[10] Appellant's Reply Br. 9-10.

The government responds that 38 U.S.C. § 7266(a) constitutes a mandatory and jurisdictional time of review provision. It frames the issue by stating that "[a] statute governing the timing of an appeal is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the lower court or tribunal ends and that of the appellate court begins." Appellee's Br. 11; *see also Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

The government argues that, in view of *Bowles*, there can be no doubt that § 7266(a) is jurisdictional. The government notes that, in *Bowles*, the Supreme Court stressed the fact that statutes specifying the time for taking an appeal in civil cases are jurisdictional. The government further notes that both this court and the

10. In 2001, Congress amended § 7266 as part of a broad package modifying the veterans' benefits system. *See* Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, § 507, 115 Stat. 976, 997.

Supreme Court have referred to proceedings in the Veterans Court as civil actions. *See Scarborough v. Principi*, 541 U.S. 401, 413, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004); *Abbs v. Principi*, 237 F.3d 1342, 1348 (Fed. Cir. 2001). Additionally, the government points out, § 7266(a) refers to the filing in the Veterans Court as a "notice of appeal," indicating that the Veterans Court does not commence litigation, but rather continues litigation first brought before the Board. The government also points out that the Veterans Court cannot review fact findings de novo, 38 U.S.C. § 7261(c), and must apply the doctrine of harmless error. *See Shinseki v. Sanders*, 129 S. Ct. 1696, 1704, 173 L. Ed. 2d 532 (2009) (holding that 38 U.S.C. § 7261(b)(2) requires the Veterans Court to apply the same kind of "harmless-error" rule that courts ordinarily apply in civil cases). In addition, the Veterans Court reviews each case that comes before it on a record that is limited to the record developed before the RO and the Board. 38 U.S.C. § 7252(a). The government argues that these requirements are characteristic of appellate courts, not courts or bodies where litigation is commenced, and that therefore it is inappropriate "to treat a veteran's appeal . . . like an 'initial' claim." Appellee's Br. 25. The government also argues that the legislative history does not support equitable tolling.

IV.

In *Bowles*, the Supreme Court "ma[d]e clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles*, 551 U.S. at 214. The Court also made it clear that courts "ha[ve] no authority to create exceptions to jurisdictional requirements." *Id.* at 214. Only Congress may do that. *Id.* at 212-13. ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."). We hold today that 38 U.S.C. § 7266(a) is a notice of appeal, or time of review, provision in a civil case. In line with *Bowles*, we further hold that because § 7266(a) is a time of review provision, it is jurisdictional and that because Congress has not so provided, the statute is not subject to equitable tolling.

A.

Preliminarily, we recognize that, as Mr. Henderson points out, we stated in *Jaquay* that "the filing of a notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first action taken by a veteran in a court of law." 304 F.3d at 1286. As he further points out, we also stated in *Jaquay* that *Bailey* decided "whether the 120-day *statute of limitations* under 38 U.S.C. § 7266 was subject to equitable tolling." *Id.* at 1283 (emphasis added). These statements do not alter our conclusion that § 7266(a) is a time of review provision.

We agree that Mr. Henderson's appeal to the Veterans Court represented the first time he could appear before a court. However, that was also the case for the litigant in *Stone*. Although Stone appeared solely within the executive system (namely, the BIA) before his petition to the circuit court of appeals, the Supreme Court still held that 8 U.S.C. § 1105a(a)(1) was mandatory and jurisdictional. Therefore, the fact that the Veterans Court is the first opportunity for a veteran to appear before a judicial body does not make § 7266(a) a statute of limitations rather than a time of review provision. More importantly, the statutory scheme convinces us that § 7266(a) is indeed a time of review provision.

Turning to the nature of proceedings in the Veterans Court, we begin by noting that both the Supreme Court and this court have labeled actions in the Veterans Court "civil actions." *See Sanders*, 129 S. Ct. at 1700 ("In these two civil cases, the Department of Veterans Affairs (VA) denied veterans' claims for disability benefits."); *Scarborough v. Principi*, 541 U.S. 401, 413, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004) (labeling veterans actions "civil actions" for purposes of fees allowed by the Equal Access to Justice Act); *Abbs v. Principi*, 237 F.3d 1342, 1348 (Fed. Cir. 2001) (same). We hold that an appeal in the Veterans Court is a "civil case." *See Bowles*, 551 U.S. at 214.

We also hold that, because it speaks to "the timely filing of a notice of appeal," *id.*, § 7266(a) is a time of review provision. First, the statute is titled "Notice of

Appeal," and it states that a veteran "*shall* file a *notice of appeal*" "in order to obtain *review*" by the Veterans Court. 38 U.S.C. § 7266(a). This language plainly suggests that § 7266(a) is a time of review provision. Beyond that, § 7252(a) of Title 38 states that the Veterans Court "*review[s]* decisions of the Board of Veterans' Appeals," while § 7252(b) provides that a decision of the Veterans Court "shall be on the record of proceedings before the Secretary and the Board." Additionally, the Veterans Court reviews the fact findings of the Board under a clearly erroneous standard, 38 U.S.C. § 7261(b), and must consider the rule of prejudicial error, 38 U.S.C. § 7261(b)(2). These are characteristics of appellate review, rather than of an assessment of claims in the first instance. *See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 464, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) (noting that it is among "the most basic principles of appellate review" that an appellate court not disturb findings of fact unless they are clearly in error) (citing Fed. R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous")); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) ("appellate courts must constantly have in mind that their function is not to decide factual issues de novo."). As the Veterans Court stated in *Frankel v. Derwinski*, 1 Vet. App. 23, 25 (1990), "the primary purpose for creating the [Veterans Court] was to provide judicial *review* of [Board] decisions." The very fact that the Veterans Court can only affirm, reverse, modify, and remand decisions of the Board indicates that it is an appellate body, not a court where claims are

commenced. *See* 38 U.S.C. § 7252(a). In contrast, a Title VII claim (like the one brought in *Irwin*) is a new civil action. While the district court will certainly consider many of the same facts and the same underlying conduct as the agency and the EEOC, the district court is free to make de novo fact findings and reach its own conclusions, unconstrained by the agency or EEOC record or conclusions. *See, e.g., Chandler v. Roudebush*, 425 U.S. 840, 863, 96 S. Ct. 1949, 48 L. Ed. 2d 416 (1976) (in a "civil action" under Title VII, the district court considers the discrimination claim de novo). For the foregoing reasons, we hold that 38 U.S.C. § 7266(a) is a time of review provision. We therefore must reject Mr. Henderson's contention that § 7266(a) is analogous to a statute of limitations.

In holding that § 7266(a) is a time of review provision, we do not break new ground. Indeed, the *Bailey* court recognized the statute as such. The court referred to § 7266(a) as being "specific in stating where, how and when the notice of appeal must be filed." 160 F.3d at 1365. In addition, in addressing *Stone's* statement that "statutory review provisions specifying the time of review" are "mandatory and jurisdictional," *Stone*, 514 U.S. at 405, this court stated: "We do not think this language can be read to mean that statutes specifying the time for review cannot be subject to equitable tolling because such statutes are mandatory and jurisdictional." *Bailey*, 160 F.3d at 1366. It would not have been necessary for the court to make this latter statement if it had not thought that § 7266(a) was a time of review provision.

B.

Holding that 38 U.S.C. § 7266(a) is a time of review provision in a civil case does not end the inquiry, however. As the dissent in *Bailey* stated, the "general principle in *Stone* regarding timing-of-review provisions would be inapplicable if there were anything in § 7266(a)(1) or its legislative history indicating that the timing provision governing appeals to the [Veterans Court] was meant to be subject to equitable tolling." *Bailey*, 160 F.3d at 1372.

Beginning with § 7266(a) itself, we see nothing on its face to indicate that it is meant to be subject to equitable tolling. The statutory language is clear and unequivocal, with no suggestion of equitable tolling:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

38 U.S.C. § 7266(a).

At the same time, looking beyond the language of the statute, we cannot glean clear intent on the part of Congress to override the presumed jurisdictional treatment of time of review provisions. *See Bread*

Political Action Comm. v. Fed. Election Comm'n, 455 U.S. 577, 585, 102 S. Ct. 1235, 71 L. Ed. 2d 432 (1982) (noting appellants' burden to show "'clear expression' or 'clear evidence' of congressional intent" to go beyond a statutory provision and make additional procedures available to plaintiffs). We begin with the legislative history of the Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), the statute that created the Veterans Court. In the Senate version of the bill, the regional circuits directly reviewed decisions of the Board, and the time of review provision was jurisdictional. *Bailey*, 160 F.3d at 1372 (citing S. 11, 100th Cong., 2d Sess. § 4025(g)(1) and S. Rep. No. 100-418 (1988), and noting that "[t]he bill provided that '[n]o action for judicial review may be brought' unless the request for review was filed within 180 days of the [Board] decision"). In the House version of the bill, the Board was replaced by "a 65-judge court responsible for reviewing decisions of the Department's regional offices." 160 F.3d at 1372 (citing H.R. 5288, 100th Cong., 2d Sess. § 4015(d)(1)). In the House bill, appeals had to be filed with the designated court within ninety days of the RO decision, but that period could be extended for good cause. 160 F.3d at 1373. Both the 180-day language in the Senate bill and the "good cause" provision in the House bill were omitted from the compromise bill that resulted in the final legislation. The *Bailey* dissent noted that, had the good cause provision remained in the final legislation, the timing statute would "have been properly construed as non-jurisdictional in nature." *Id.* Because the final bill did not retain the good-cause exception, the dissent stated that the compromise bill suggested § 7266(a) was jurisdictional in nature. *Id.* We agree.

Appendix A

Congress amended § 7266 in 1994. *See* Veterans' Benefits Improvements Act of 1994, Pub. L. No., 103-446, § 511(a), 108 Stat. 4645, 4670 (1994). The amendment did not affect the jurisdictional nature of the timing requirement, however. *Bailey*, 160 F.3d at 1373. The 1994 amendment simply altered the requirement of actual delivery of a notice of appeal to the Veterans Court within 120 days, by providing that notices of appeal would be deemed timely if they were mailed within the 120-day appeal period. *See id.*; 38 U.S.C. § 7266(b), (c). The Bailey dissent determined that "[t]he 1994 amendment thus made the timely filing requirement more lenient by establishing a 'postmark rule,' but it did not alter the jurisdictional nature of that requirement." 160 F.3d at 1373. Again, we agree.

As noted above, Mr. Henderson has observed that eleven years have passed since *Bailey*, and he argues that Congress has thus acquiesced in our reading of § 7266(a) in *Bailey*. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978). It is true that in the period since 1998, Congress has not amended § 7266(a) in a way that would disturb *Bailey*. *See supra* note 10. We are not prepared to conclude, however, that this congressional inactivity represents clear intent to rebut the jurisdictional treatment of § 7266(a), as urged by Mr. Henderson. The "re-enactment rule" delineated in *Lorillard* does not establish congressional acquiescence in all situations.

See, e.g., *Coke v. Long Island Care At Home, Ltd.*, 376 F.3d 118, 130 n.5 (2d Cir. 2004) (discussing the limitations on the congressional acquiescence argument, "affectionately known as the 'dog didn't bark canon'"), *vacated and remanded on other grounds*, 546 U.S. 1147, 126 S. Ct. 1189, 163 L. Ed. 2d 1125 (2006). Here, it would be inappropriate to rely on congressional "silence" to find approval of Mr. Henderson's position, i.e., that Congress has acquiesced in the interpretation we gave the statute in *Bailey*, when the Supreme Court itself has characterized its precedent as having *"long and repeatedly held* that the time limits for filing a notice of appeal are jurisdictional in nature." *Bowles*, 551 U.S. at 206 (emphasis added). We agree with the government that, in this instance, it is more appropriate to presume that Congress intended application of "long and repeated[]" and "consistent[]" Supreme Court precedent rather than to presume that Congress *sub silentio* intended the statutory appeal period at issue to be nonjurisdictional. We hold that because § 7266(a) is a time of review provision in a civil case and because Congress has not so provided, it is not subject to equitable tolling. It is thus mandatory and jurisdictional.

Though recognizing § 7266(a) as a time of review provision, the *Bailey* court held that it was subject to equitable tolling. It reached this conclusion because it determined that *Irwin* was controlling. As seen, this holding was based upon two determinations. First, the court concluded that *Irwin* "d[id] not distinguish among the various kinds of limitations that may act as conditions to the waivers of sovereign immunity required

to permit a cause of action to be pitched against the United States." *Id.* at 1364. Second, and most importantly, the court rejected the proposition that *Irwin* had been limited by *Stone*. Examining *Stone*, the court concluded that its language that statutory time of review provisions are "mandatory and jurisdictional" meant only that such provisions "are not subject to equitable tolling after *Irwin* if Congress has so expressed its intent." *Id.* at 1366. The *Bailey* court concluded by stating that it was "not comfortable" drawing "a bright line which would place statutes of limitation on one side of the *Irwin* presumption [in favor of equitable tolling] and statutes of timing of review on the other." *Id.* at 1367.

Bailey's holding that § 7266(a) is subject to equitable tolling has been undermined by *Bowles*, however. As seen, in *Bowles*, the Supreme Court stated: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles*, 551 U.S. at 214. And of particular significance for this case, the Court further stated that because Bowles's error in filing his appeal late was "one of jurisdictional magnitude, he [could] not rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations." *Id.* at 213. The Court added that it had no authority to create equitable exceptions to jurisdictional requirements. *Id.* at 214. The critical point is that, whereas in *Bailey* we relied on *Irwin* to conclude that time of review provisions are subject to equitable tolling unless Congress has expressed a contrary intent, *see* 160 F3d at 1365-66, in *Bowles* the Court reached

the conclusion that because time of review provisions are mandatory and jurisdictional, they *are not* subject to equitable tolling unless Congress so provides, *see* 551 U.S. at 212-13. Thus, in light of *Bowles*, we are compelled to draw the bright line between statutes of limitations and time of review provisions that the *Bailey* court declined to draw. Because Congress has not expressed the requisite assent, we hold that the time of review period in § 7266(a) is not subject to equitable tolling.

C.

Faced with *Bowles*, Mr. Henderson contends that the reach of the Court's decision is limited. First, he argues that, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008), the Supreme Court had the opportunity to expand its holding in *Bowles*, but chose not to do so. Appellant's Br. 15. He states that one issue in *John R. Sand & Gravel* was whether 28 U.S.C. § 2501, the six-year statute of limitations applicable to Tucker Act suits in the United States Court of Federal Claims, is subject to equitable tolling. According to Mr. Henderson, the Court held that § 2501 is "jurisdictional," citing *Bowles* to support its definition of a "jurisdictional" statute. "But," Mr. Henderson continues, "the Supreme Court did not expand *Bowles* by holding that because the statute is jurisdictional, it is not subject to equitable tolling." *Id.* The government rejoins that *John R. Sand & Gravel* does not help Mr. Henderson.

We are not persuaded by Mr. Henderson's argument that *John R. Sand & Gravel* suggests that *Bowles* is limited. The issue in *John R. Sand & Gravel* was narrow. The Supreme Court stated: "The question presented is whether a court must raise on its own the timeliness of a lawsuit filed in the Court of Federal Claims, despite the Government's waiver of the issue." 552 U.S. at 132. The Court held that 28 U.S.C. § 2501, which it characterized as "the special statute of limitations governing the Court of Federal Claims," required "that *sua sponte* consideration." *Id.* The Court affirmed the decision of this court to consider the timeliness of John R. Sand & Gravel's suit in the Court of Federal Claims even though the government had waived the issue. *Id.* at 139; *see John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345 (Fed. Cir. 2006).

It is true that, in deciding *John R. Sand & Gravel*, the Court mentioned *Bowles* in passing in referring to "jurisdictional" statutes. *See John R. Sand & Gravel*, 552 U.S. at 134 ("As convenient shorthand, the Court has sometimes referred to the time limits in [statutes of limitations] as 'jurisdictional.' *See, e.g., Bowles, supra*, at 2364.") However, contrary to Mr. Henderson's argument, because *John R. Sand & Gravel* involved the issue of waiver and a statute of limitations provision, rather than the issue of equitable tolling and a time of review provision, which was at issue in *Bowles*, there was no need for the *John R. Sand & Gravel* Court to discuss *Bowles* further one way or the other. Thus, not surprisingly, the Court focused its attention on *Irwin*, which, as a statute of limitations case, was pertinent to

the issue before it. In short, we do not see *John R. Sand & Gravel* as being helpful to Mr. Henderson.

Mr. Henderson makes a second argument to limit *Bowles*. He contends that the Court's decision in *Bowles*, which did not discuss § 7266(a) or the doctrine of equitable tolling, Appellant's Br. 13-14, "relies on separation of powers principles that apply to Article III courts." *Id.* at 22. Mr. Henderson states that *Bowles* "is consistent with the fundamental principle that Article III courts cannot 'extend by rule the judicial power of the United States described in Article III of the Constitution.'" *Id.* at 23 (quoting *Willy v. Coastal Corp.*, 503 U.S. 131, 135, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)). Mr. Henderson urges that this principle does not apply to Article I tribunals such as the Veterans Court: "The Supreme Court in *Bowles* was not faced with, and did not reach, the question of whether statutory time limits applicable to Article I courts may be extended on equitable grounds," he states. *Id.*

The government urges that the Article I nature of the Veterans Court should not change our analysis. The government notes that the Supreme Court and circuit courts of appeals have held that time limits on appeals from agency orders and adjudications can be jurisdictional. *See Stone*, 514 U.S. at 406; *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 118 (2d Cir. 2008) (applying *Bowles*); *Cellular Telecomm's. & Internet Ass'n v. FCC*, 330 F.3d 502, 508, 356 U.S. App. D.C. 238 (D.C. Cir. 2003); *Florilli Corp. v. Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997); *AFL-CIO v. OSHA*, 905 F.2d 1568, 1570, 284 U.S. App.

D.C. 401 (D.C. Cir. 1990); *Shendock v. Dir. Office Workers' Comp. Programs*, 893 F.2d 1458, 1462-66 (3d Cir. 1990). According to the government, here, as in *Griggs v. Provident Consumer Discount Co.*, the notice of appeal divests jurisdiction from one body and vests jurisdiction in another.[11] The government argues that this jurisdictional transfer occurs regardless of whether the bodies involved were created under Article I or Article III.

The Supreme Court has recently said: "[I]t is for Congress to determine the subject-matter jurisdiction of federal courts. This rule applies with *added* force to Article I tribunals, . . . which owe their existence to Congress' authority to enact legislation pursuant to Art. 1, § 8 of the Constitution." *United States v. Denedo*, 129 S. Ct. 2213, 2221, 173 L. Ed. 2d 1235 (2009) (citing *Bowles*) (internal citations and quotation marks omitted) (emphasis added). Additionally, as stated in *Bowles*, "the notion of subject-matter jurisdiction obviously extends to classes of cases . . . falling within a court's adjudicatory authority, but it is no less jurisdictional when Congress forbids federal courts from adjudicating an otherwise legitimate class of cases after a certain period has elapsed from final judgment." 551 U.S. at 213 (internal

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11. In *Griggs*, the Supreme Court reversed the Third Circuit's acceptance of jurisdiction pursuant to a premature filing of a notice of appeal. 459 U.S. at 58. In so doing, the Court stated: "The filing of a notice of appeal *is an event of jurisdictional significance*—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Id.* (emphasis added).

citations and quotation marks omitted) (omission in original). As a result, "when an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Id.* (internal quotation marks omitted). Because the Supreme Court has stated that the jurisdictional rationale applies with even "*added*" force to Article I courts, we cannot agree with Mr. Henderson that the Article I nature of the Veterans Court changes the analysis under *Bowles*.

D.

For their part, the amici contend that while 28 U.S.C. § 2107(c), which was at issue in *Bowles*, is written in language limiting the Article III jurisdiction of the federal appellate courts, § 7266(a) is written as a "claim processing" rule, and therefore should be treated as non-jurisdictional. The amici note that subsection (c) of § 2107 provides that the "district court" can "extend the time for appeal" in certain instances. *See, e.g.*, Halseth Br. 22; NOVA Br. 8. They argue that this language defines the limits of what the district court can and cannot do, and therefore must be jurisdictional. By contrast, amici urge, § 7266(a) defines what the *veteran* must do, and the statute is therefore a claim processing rule, and not jurisdictional. Specifically, as seen, § 7266(a) provides that "a person adversely affected" by a decision of the Board "shall file a notice of appeal with the [Veterans Court] within 120 days after the date on which notice of the decision is mailed." Because the statute does not facially indicate which

cases the Veterans Court can and cannot take, amici argue that § 7266(a) does not contain any jurisdictional limitations. *See, e.g.*, Halseth Br. 13, 23; DAM Br. 6-7; PV/JWV Br. 4.

We reject the argument that § 7266(a) is subject to equitable tolling because it is a claim processing rule. As stated by the Supreme Court in *Bowles*, claim-processing rules "adopted by [a c]ourt for the orderly transaction of its business" are not jurisdictional (and indeed, cannot be, as only Congress can dictate the jurisdiction of the lower Article III courts). 551 U.S. at 211. At the same time, the Court has stressed "the jurisdictional significance of the fact that a time limitation is set forth in a *statute*," as opposed to in a court-promulgated rule. Id. at 210. As an initial matter, it is clear that § 7266(a) is not a "court-promulgated rule[ ]," but is a time limit enacted by Congress. It thus could properly be deemed "jurisdictional" under *Bowles*.

We recognize that while 28 U.S.C. § 2107, the statute at issue in *Bowles*, is phrased in terms of what the district court can and may do, § 7266(a) is phrased in terms of the actions a veteran must take to preserve his or her right to appeal. We conclude, however, that this distinction does not convert § 7266(a) into a claim-processing rule. The time limit is set out statutorily, a crucial point for the Supreme Court in determining which of such limits are jurisdictional and which are not. *See Bowles*, 551 U.S. at 211 (noting that § 2107 contains "the type of statutory time constraints that would limit a court's jurisdiction.") Moreover, although the statute

at issue here is drafted in terms of the veteran's obligations, it states that the notice of appeal "*shall*" be filed with the Veterans Court within 120 days of the mailing of the Board's final decision. 38 U.S.C. § 7266(a) (emphasis added). Furthermore, as we stated in Bailey, we must read the jurisdictional waiver of sovereign immunity for the Veterans Court, set forth in 38 U.S.C. § 7252, in light of the qualifications in § 7266, "because we must construe jurisdictional statutes narrowly and 'with precision and with fidelity to the terms by which Congress has expressed its wishes.'" *Bailey*, 160 F.3d at 1363. Section 7266(a) is the only provision that specifies the timing for filing a notice of appeal in the Veterans Court. The textual focus on the veteran does not transform the statute into a claim-processing rule.

V.

The final argument Mr. Henderson and the various amici make is that because the veterans system is uniquely non-adversarial and pro-claimant, we should not import jurisdictional rules into the system. The amici note that the Veterans Court was created to be an extra safeguard for those who served in the military, and that Congress strove to ensure, at the court's inception, that it was "[a]ccurate, informal, efficient, and fair." H.R. Rep. No. 100-936 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5808. The amici urge that only a flexible system, which allows for equitable tolling, can meet these four goals. *See, e.g.*, United Spinal Br. 4.

The government responds that we have stated that proceedings before the Veterans Court are not non-adversarial, and that there are certain legal requirements veterans must meet. *See Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir. 2002), *superseded by statute on other grounds* ("The veterans' benefits system remains a non-adversarial system when cases are pending before the Veterans' Administration. However, the [Veterans Court's] proceedings are not non-adversarial."); *Bailey*, 160 F.3d at 1365 ("[V]eterans like Bailey must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review."). Although recognizing that special protections are afforded the veteran, the government argues that the meaning of § 7266(a) is clear, and we may not ignore the fact that the statute is a time of review provision.

As far as the uniquely pro-claimant, non-adversarial nature of the veterans system is concerned, we acknowledge that the government has special duties to assist a veteran with his or her claim. However, we have recently been reminded by the Supreme Court that, although "Congress has expressed special solicitude for the veterans' cause," we do not have free rein to establish special procedural schemes governing the veterans' system alone. *Shinseki v. Sanders*, 129 S. Ct. at 1707. In *Sanders*, the Supreme Court struck down our unique harmless error rubric, concluding that it was "too complex and rigid," and "impose[d] unreasonable evidentiary burdens upon the VA." *Id.* at 1700. In reaching this conclusion, the Court traced

the parallel language of the Administrative Procedure Act and the Veterans Court's harmless error statutes. The Supreme Court found "no indication of any relevant distinction between the manner in which reviewing courts treat civil and administrative" cases, and concluded that we must apply the harmless error framework set forth for "ordinary civil cases." *Id.* at 1704.

We complete our analysis with *Sanders* in mind. While it is clear the veterans' system is unique, we must be wary of hinging different procedural frameworks solely on the special nature of that system. Jurisdiction is in the province of Congress, and without any clear intent by Congress to provide for equitable relief from the Notice of Appeal filing deadline in 38 U.S.C. § 7266(a), we cannot read in such relief based on the nature of the veterans system.

CONCLUSION

We hold that 38 U.S.C. § 7266(a) is a time of review provision in a civil case and that, because Congress has not so provided, it is not subject to equitable tolling. The statute is thus mandatory and jurisdictional. We therefore overrule our decisions in *Bailey* and *Jaquay*, where we held that § 7266(a) is subject to equitable tolling. We overrule *Bailey* and *Jaquay* not because we have concluded in retrospect that they were incorrectly decided in light of then-current Supreme Court authority. Rather, we do so because we have concluded that they have been overtaken by subsequent authority, specifically, *Bowles*, where the Supreme Court

unequivocally stated that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement" and that it had "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214. If Congress determines that the 120-day period for appealing to the Veterans Court from a decision of the Board should be subject to equitable tolling, it may amend § 7266(a) to compel a result different from the one we reach today. We, however, are not empowered to make that change. *See id.* at 215. For the foregoing reasons, the Veterans Court correctly held that it lacked jurisdiction to consider Mr. Henderson's appeal. Its decision dismissing his appeal is therefore affirmed.[12]

AFFIRMED

COSTS

No costs.

12. The court is grateful to Thomas W. Stoever, Jr. and Jacek A. Wypych of Arnold & Porter LLP for their excellent pro bono representation of Mr. Henderson.

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-7006

DAVID L. HENDERSON,

Claimant-Appellant,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in 05-0090, Chief Judge William P. Greene, Jr.

DYK , *Circuit Judge*, with whom GAJARSA and MOORE, *Circuit Judges*, join, concurring.

I join the opinion of the Court, but I also agree with Judge Mayer that the rigid deadline of the existing statute can and does lead to unfairness. This is particularly so in the many cases where the veteran is not represented by counsel during the processing of the claim at the Veterans Administration and/or is suffering from a mental disability. These circumstances can make it extremely difficult for the veteran to navigate the system and meet the statutory deadline. These situations are not merely hypothetical, as our prior

decisions demonstrate.[1] In this case, the veteran suffered from a service-connected mental illness allegedly leading to the late filing. The problems with the rigid rule of the existing statute may suggest that Congress should amend the statute to provide a good cause exception.

1. *See Barrett v. Nicholson*, 466 F.3d 1038 (Fed. Cir. 2006) (service-connected mental illness); *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc) (claimant's non-attorney representative mistakenly mailed request for reconsideration to wrong office, thus resulting in untimely filing); *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc) (no counsel; regional office mistakenly retained appeals documentation, thus resulting in untimely filing).

MAYER, *Circuit Judge*, with whom MICHEL, *Chief Judge*, and NEWMAN, *Circuit Judge*, join, dissenting.

"Courts do not normally overturn a long line of earlier cases without mentioning the matter." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) ("*Sand & Gravel*"). *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007), did not mention—much less overrule—the Supreme Court's long line of cases affirming the application of equitable tolling. And our sister circuit courts of appeals have concluded that the doctrine of equitable tolling survives *Bowles* and applies to statutory filing deadlines. *See Ross-Tousey v. Neary*, 549 F.3d 1148 (7th Cir. 2008); *Diaz v. Kelly*, 515 F.3d 149 (2d Cir. 2008); *Coker v. Quarterman*, 270 Fed. App'x 305 (5th Cir. 2008). For this court to stake out the opposite position is lamentably unsupportable.

I.

No legal system can function without deadlines, but the majority's eradication of equitable tolling in proceedings before the United States Court of Appeals for Veterans Claims ("Veterans Court") creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them. It is the veteran who incurs the most devastating service-connected injury who will often be the least able to comply with rigidly enforced filing deadlines. Under the majority's approach, this veteran will be both "out

of luck and out of court," since failure to comply with the 120-day deadline prescribed in 38 U.S.C. § 7266(a) means that he forfeits all right to judicial review of his claim.

Two en banc panels of this court have held that the time limit for filing an action under section 7266(a) at the Veterans Court is subject to equitable tolling. *See Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002); *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998). We have recognized that "[i]t would be both ironic and inhumane to rigidly implement section 7266(a) because the condition preventing a veteran from timely filing is often the same illness for which compensation is sought." *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004).

Although a majority of this court now wants to jettison this well-established, salutary precedent, *Bowles* provides a very flimsy foundation for doing so. *Bowles* neither addresses nor undermines this court's rationale for permitting equitable tolling in actions brought in the Veterans Court. The application of equitable tolling under section 7266(a) flows directly from the Supreme Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). *Irwin* was not—and could not have been—at issue in *Bowles*. The *Irwin* presumption of equitable tolling applies only when the federal government is the defendant in an action. 498 U.S. at 95-96. In *Bowles*, on the other hand, a state prisoner brought a federal habeas petition, and the state, not the federal government, was the defendant. *See* 551 U.S. at 207.

Irwin's equitable tolling principles were therefore clearly not at issue in *Bowles*, and it is for this reason that the majority opinion there did not cite, much less seek to distinguish, *Irwin*. It was because the doctrine of equitable tolling was not available that the petitioner in *Bowles* attempted to rely on the "unique circumstances" doctrine to excuse his untimely filing. *See Bowles*, 551 U.S. at 213-14; *see also Sierra Club N. Star Chapter v. Peters*, No. 07-2593, 2008 U.S. Dist. LEXIS 39966, at *21 (D. Minn. 2008) (concluding that *Bowles* is simply "not relevant" to the application of equitable tolling under *Irwin*).

If there was any doubt that *Bowles* left the *Irwin* doctrine of equitable tolling unscathed, it was dispelled by the Supreme Court's recent decision in *Sand & Gravel*. There the Court reaffirmed the continuing vitality of the *Irwin* presumption of equitable tolling, although the Court ultimately concluded that the presumption had been rebutted with respect to the filing of suit under 28 U.S.C. § 2501 at the United States Court of Federal Claims.[1] *Sand & Gravel*, 552 U.S. at 133-38. Simply put, "*Irwin* remains good law." *Santos v. United States*, 559 F.3d 189, 197 (3d Cir. 2009). Because our application of equitable tolling at the Veterans Court flows directly from *Irwin*, nothing in *Bowles* provides a sufficient basis for casting aside our long-established equitable tolling jurisprudence.

1. The Court concluded that the "definitive earlier interpretation of the statute" applicable to suits filed in the Court of Federal Claims "offer[ed] a . . . sufficient rebuttal" to the *Irwin* presumption. *Sand & Gravel*, 552 U.S. at 137-38.

The majority seizes upon the following sentence from *Bowles*: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." 551 U.S. at 214. When read in context, however, it is clear that this statement means only that the appellate filing deadline set by Rule 4 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2107(a) is jurisdictional in nature.[2] *Bowles* begins its analysis by stating that it is addressing the question of "whether the Court of Appeals lacked jurisdiction to entertain an appeal filed outside the 14-day window allowed by § 2107(c)." 551 U.S. at 209. The Court then proceeds to answer that narrow question by analyzing cases appealed from one Article III court to another Article III court. Over and over again in its relatively brief opinion, the Supreme Court focuses on appeals from a district court to a court of appeals. *See id.* at 210 ("[E]ven prior to the creation of *the circuit courts of appeals*, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction." (emphasis added)); *id.* ("*[T]he courts of appeals* routinely and uniformly dismiss untimely appeals for lack of jurisdiction." (emphasis added)); *id.* at 213 ("Bowles' failure to file his notice of appeal in accordance with the statute . . . deprived *the Court of Appeals* of jurisdiction." (emphasis added)). Notably, each of the cases cited by the Court to support its conclusion that the filing of a notice of appeal within a statutorily prescribed period

2. Fed. R. App. P. 4 "carries [28 U.S.C. § 2107(c)] into practice" and "describes the district court's authority to reopen and extend the time for filing a notice of appeal." *Bowles*, 551 U.S. at 208.

is "mandatory and jurisdictional" involved appeals from one Article III court to another. *Id.* at 209-10. Because *Bowles* is limited, by its facts and the cases upon which it relies, to appeals from one Article III court to another, it does not speak to the separate issue of whether equitable tolling applies to judicial review of agency decisions.

A fundamental fallacy underlying the majority's approach to section 7266(a) is that it confuses extending a limitations period with suspending one. *Bowles* addressed the question of whether a district court could extend the statutory time limit for reopening an appeal from fourteen to seventeen days. 551 U.S. at 209-10. Tolling does not extend any statutory deadline; instead it "temporarily halts" the running of the statutory clock. *See Jaquay*, 304 F.3d at 1281 n.2. "Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped." *United States v. Ibarra*, 502 U.S. 1, 4 n.2, 112 S. Ct. 4, 116 L. Ed. 2d 1 (1991). While *Bowles* considered the question of whether a district court had authority to extend a statutory deadline for filing an appeal, it said nothing about whether a particular limitations period could be suspended because of equitable considerations. Here, the relevant inquiry is not whether the Veterans Court can extend the 120-day filing period, but whether the running of the statutory period is suspended during periods when a veteran is physically or mentally incapacitated.

A second significant difficulty with the majority's approach is that it applies *Bowles* to the wrong filing deadline. *Bowles* addresses the jurisdictional significance of the time limit for appealing a district court decision to a court of appeals. In the veterans' adjudicatory system, an appeal from the Veterans Court to this court is the procedural equivalent of an appeal from a district court to a court of appeals. *See* 38 U.S.C. § 7292 (providing that appeals from the Veterans Court to this court are to be taken "within the time and in the manner prescribed for appeals to United States courts of appeal from United States district courts"). Thus, even assuming *arguendo* that *Bowles* can be extended to the system for adjudicating veterans' claims, it would make the time limit for appealing *from* the Veterans Court—instead of the time limit for appealing *to* the court—jurisdictional in nature. *See Henderson v. Peake*, 22 Vet. App. 217, 224 n.2 (2008) (Schoelen, J., dissenting) ("[I]f anything, *Bowles* supports the Federal Circuit's practice of refusing to allow equitable tolling for appeals from [the Veterans Court] to the Federal Circuit.").

The third and most important error infecting the majority's analysis is that it fails to properly differentiate between deadlines for bringing suit and those for filing appeals. A trial court's judgment is presumed "correct and final, except only for such review and revision as are specified in the statute authorizing and establishing the pre-conditions for appeal." *Bailey*, 160 F.3d at 1370 (Michel, J., concurring). Thus, an "appellate court['s] power of review is sharply limited, for judgments are reviewable only if both final and

adverse to the party appealing and . . . filed within the time required by statute." *Id.* This is precisely what *Bowles* recognizes: if an appeal of a court's judgment "has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." 551 U.S. at 213 (citations and internal quotation marks omitted); *see Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982). (Filing an appeal of a district court decision "is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

In contrast to time limits for appeal, deadlines for bringing suit are generally not deemed jurisdictional. They are instead viewed as statutes of limitations, subject to equitable tolling. *See Sand & Gravel*, 552 U.S. at 133 ("Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims" and "typically permit courts to toll the limitations period in light of special equitable considerations."); *Rotella v. Wood*, 528 U.S. 549, 560, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000) ("[F]ederal statutes of limitations are generally subject to equitable principles of tolling."). The Supreme Court has made clear that time limits for seeking initial court review of adverse agency actions are generally classified as statutes of limitations rather than jurisdictional bars. In *Bowen v. City of New York*, 476 U.S. 467, 480-81, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986), the Court unanimously ruled that equitable

tolling applies to the statutory sixty-day period for bringing an action in district court to review a denial of Social Security disability benefits by the Secretary of Health and Human Services. Likewise, in *Irwin*, the Court held that equitable tolling applies to the statutory thirty-day period for seeking review in district court of a final action by the Equal Employment Opportunity Commission ("EEOC"). 498 U.S. at 95-97.

Just as the statutes construed in *Bowen* and *Irwin*, section 7266(a) provides a time limit for seeking initial court review of an adverse agency action. *See Jaquay*, 304 F.3d at 1286 ("[T]he filing of a notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first action taken by a veteran in a court of law."). Furthermore, like the Social Security benefits scheme involved in *Bowen* and the employment discrimination scheme addressed in *Irwin*, the veterans' benefits system is an adjudicatory framework "that Congress designed to be unusually protective of claimants." *Bowen*, 476 U.S. at 480 (internal quotation marks omitted); *see Jaquay*, 304 F.3d at 1280 ("Congress has created a paternalistic veterans' benefits system to care for those who served their country in uniform."). Because section 7266(a) is similar in most important respects to the statutes at issue in *Bowen* and *Irwin*, and is fundamentally different from that addressed in *Bowles*, it is properly viewed as a statute of limitations rather than a rigid jurisdictional bar.

Stone v. Immigration & Naturalization Service, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995),

upon which the majority relies, is not to the contrary. *Stone* held that the time limit for appealing a final deportation order issued by the Board of Immigration Appeals is not amenable to equitable tolling. *Id.* at 405. Removal proceedings, however, "closely resemble a trial" and "are adversarial and employ many of the same procedures used in Article III courts." *Frango v. Gonzales*, 437 F.3d 726, 728 (8th Cir. 2006) (citations and internal quotation marks omitted); *Etchu-Njang v. Gonzales*, 403 F.3d 577, 583 (8th Cir. 2005) (contrasting "adversarial" removal proceedings with "inquisitorial" Social Security benefit proceedings). Because the appeal of a final deportation order is very similar to an appeal from a district court decision, it is not surprising that the Court determined that the deadline for appealing a deportation order is not subject to equitable tolling. Indeed, *Stone* itself recognizes that its decision to preclude equitable tolling was an aberration, and the general rule is that tolling applies to time limits for bringing suit against the federal government. 514 U.S. at 398 ("Underlying considerations of administrative and judicial efficiency . . . support our conclusion that Congress intended to depart from the conventional tolling rule in deportation cases.")

When a veteran brings a claim before the Board of Veterans' Appeals ("board"), "the relationship between the veteran and the government is non-adversarial and pro-claimant." *Jaquay*, 304 F.3d at 1282. Thus, unlike deportation actions, proceedings before the board are fundamentally unlike proceedings before a district court. *See Bailey*, 160 F.3d at 1370 (Michel, J.,

concurring) (explaining that the board "is not a trial court"); *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (en banc) (Mayer, C.J., dissenting) (Board proceedings are "entirely inquisitorial" in that their purpose "is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case.") Because board proceedings are non-adversarial in nature, it is the Supreme Court's decisions in *Irwin* and *Bowen*, not *Stone*, which control.

II.

"Obedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007). As other circuits have correctly recognized, it is an "unwarranted extension of *Bowles* to think that the Court was impliedly rendering equitable tolling inapplicable to limitations periods just because they are set forth in statutes." *Diaz*, 515 F.3d at 153. Interpreting *Bowles* to apply to every statutory filing deadline "would overturn huge swaths of established case law." *Ross-Tousey*, 549 F.3d at 1155. Thus, in the wake of *Bowles*, many courts have concluded that the doctrine of equitable tolling is alive and well and can appropriately be applied to many different filing deadlines. *See, e.g.*, *Rouse v. Dep't of State*, 567 F.3d 408, 417 (9th Cir. 2009) (applying equitable tolling to the limitations period for filing claims under the Privacy Act); *Santos*, 559 F.3d at 194-97 (concluding that equitable tolling is available

under the Federal Tort Claims Act); *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (2d Cir. 2009) (concluding that *Bowles* did not invalidate the application of equitable tolling to the time limit for claims under the Antiterrorism and Effective Death Penalty Act ("AEDPA")); *Ross-Tousey*, 549 F.3d at 1155 (concluding that the deadline for filing a motion to dismiss under Chapter 7 of the Bankruptcy Code was not jurisdictional); *Diaz*, 515 F.3d at 153 (concluding that equitable tolling applies under the AEDPA); *Percy v. Shinseki*, 23 Vet. App. 37, 44 (2009) (concluding that the time limit for filing a substantive appeal to the board under 38 U.S.C. § 7105(d)(3) is not jurisdictional); *Engel v. 34 E. Putnam Ave. Corp.*, 552 F. Supp. 2d 291, 294 (D. Conn. 2008) (concluding that the 30-day period for filing a motion to remand a case under 28 U.S.C. § 1447(c) was not jurisdictional); *but see, e.g., United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009) (concluding, in light of *Bowles*, that the statutory timing provision for criminal appeals from the United States Navy-Marine Corps Court of Criminal Appeals, 10 U.S.C. § 867(b), is "jurisdictional" and not susceptible to equitable tolling).

Indeed, in an aptly titled case, *United States v. Henderson*, 536 F.3d 776, 779 (7th Cir. 2008), the Seventh Circuit correctly determined that, notwithstanding *Bowles*, not all statutory time for appeal provisions are jurisdictional. At issue there was the time for appeal provision contained in 18 U.S.C. § 3731, which provides that the government has the right to appeal "a decision or order of a district court suppressing or excluding evidence" so long as the appeal is "taken within thirty days after the decision, judgment or order has been rendered."

536 F.3d at 778. Although the government failed to file its appeal within the statutorily prescribed period, the Seventh Circuit rejected the contention that *Bowles* required dismissal of the appeal. *Id.* at 778-79. The court explained that "*Bowles* considered whether a court may make an exception to a statutorily imposed time limit for filing an appeal; it did not involve the separate question of when such a time limit begins to run." *Id.* at 779 n.2.[3] A similar analysis can be applied here. Even assuming *arguendo* that *Bowles* precludes the Veterans Court from making "exceptions" to section 7266(a)'s limitations period, it does not specify when the limitations period begins to run. Accordingly, there is nothing in *Bowles* to prevent a determination that the statutory period does not begin to run or, as discussed previously, is suspended during periods when a veteran is physically or mentally incapacitated.

III.

"It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49-50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) (citations and internal quotation marks omitted). Thus, in analyzing section

3. The court ultimately concluded that the statutory period for filing an appeal did not begin to run during the pendency of a timely filed motion for reconsideration, notwithstanding the fact that the statute provided that appeals had to be taken within thirty days of a district court decision. *Henderson*, 536 F.3d at 779 n.2.

7266(a), the key inquiry is whether "there [is] a good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997) (emphasis in original)); *Sand & Gravel*, 552 U.S. at 138 (noting that the *Irwin* presumption of equitable tolling can be rebutted "by demonstrating Congress' intent to the contrary"); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."). The majority adduces nothing to demonstrate that Congress intended to preclude the application of equitable tolling in proceedings before the Veterans Court. To the contrary, section 7266(a)'s language, legislative history and placement within a uniquely benevolent adjudicatory scheme compel the conclusion that it was designed to function as a statute of limitations rather than an inflexible jurisdictional bar.

A. *Limits on a Court's Reviewing Authority*

The Supreme Court has historically distinguished between statutes that address the power of a court to hear a case and those that impose timely filing obligations on individual litigants. *See Kontrick v. Ryan*, 540 U.S. 443, 453-55, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) (discussing the difference between a court's authority to hear a case, and rules that simply tell a court how to process claims in cases that Congress has permitted the courts to hear). While the former are

mandatory and jurisdictional, the latter are not, and can be equitably tolled in appropriate circumstances. *See id.* The statute at issue in *Bowles* contains an express limit on the power of Article III courts to hear appeals. *See* 28 U.S.C. § 2107(a) ("[N]o appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed . . . within thirty days after the entry of . . . judgment."). Given this explicit limit on judicial authority, it is not surprising that the Supreme Court determined that the failure to file within the period specified in the statute "deprived the Court of Appeals of jurisdiction." *Bowles*, 551 U.S. at 213.

Here, in contrast, section 7266(a) is not framed as an express limit on the authority of the reviewing tribunal, but instead speaks only to the actions a veteran must take to bring his claim:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

38 U.S.C. § 7266(a).

Because the statute at issue here, unlike the statute at issue in *Bowles*, does not contain an explicit limitation on the authority of the reviewing court, it is properly

classified as a claims-processing rule, which, while serving the salutary purpose of protecting against stale claims, is not imbued with the jurisdictional heft of a statutory limit on judicial authority. *See Kontrick*, 540 U.S. at 455 ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.").

Tellingly, Congress considered, but rejected, language that might have made section 7266(a) jurisdictional in nature. When it was wrestling with different approaches to judicial review of veterans' claims, a Senate bill proposed direct review of board decisions by the regional circuit courts of appeals. It stated that "no action [for judicial review] may be brought" unless the request for review "is filed not more than 180 days after" notice of the board's decision. S. 11, 100th Cong., 2d Sess. § 4025(g)(1). That language "was clearly jurisdictional in nature," *Bailey*, 160 F.3d at 1372 (Bryson, J., dissenting), similar in many respects to the language of the statute deemed jurisdictional in *Bowles*. *See* 28 U.S.C. § 2107(a) ("[N]o appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed . . . within thirty days after the entry of . . . judgment."). Because Congress ultimately rejected language that would have framed the deadline for filing at the Veterans Court as a limit on the power of the court to hear a case, we can presume that it did not intend for section 7266(a) to serve as a

jurisdictional bar. *See Arctic Slope Native Ass'n v. Sebelius*, 583 F3d 785, 2009 U.S. App. LEXIS 21361, at *37 (Fed. Cir. Sept. 29, 2009) ("Of course, a central factor in determining whether a particular statute is subject to equitable tolling is the language used to set forth the time limitation.").

The language Congress ultimately selected for framing the deadline for filing appeals to the Veterans Court, however, is remarkably similar to the language it choose to set forth the time limit for bringing a challenge to a final EEOC action in the statute addressed in *Irwin*. There the statute provided that "an employment discrimination complaint against the Federal Government under Title VII must be filed 'within thirty days of receipt of notice of final action taken' by the EEOC." *Irwin*, 498 U.S. at 92 (quoting 42 U.S. C. § 2000e-16(c)). Because section 7266(a), like the *Irwin* statute, imposes timely filing obligations on an individual litigant seeking court review of an adverse agency action, instead of imposing limits on the authority of a reviewing tribunal, it is properly viewed as a statute of limitations rather than a jurisdictional bar.

Little, if any, significance can be attached to the fact that during the period when Congress was wrestling with different approaches to providing judicial review of veterans' claims, a bill in the House provided that the time period for filing at the Veterans Court could be extended "for good cause shown." *See* H.R. 5288, 100th Cong., 2d Sess. § 4015(d)(1). This bill also proposed eliminating the board and replacing it with a 65 judge

Court of Veterans Appeals that would have had responsibility for direct review of decisions from the Veterans Affairs' regional offices. *Id.* at § 4003. Because the good cause exception was part of an adjudicatory framework that was ultimately rejected by Congress, it is not surprising that there is no explicit good cause exception in the final version of section 7266(a). Indeed, by the time Congress finally passed the Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105, in 1988, the Supreme Court had already determined that equitable tolling applied to the time limits for bringing challenges to adverse agency decisions. *See Bowen*, 476 U.S. at 477-79. Under such circumstances, it would have been superfluous to include a provision allowing tolling of the limitations period under section 7266(a). *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

The majority makes much too much of the fact that the filing a veteran uses to commence litigation at the Veterans Court is styled a "notice of appeal." Presumably, Congress only used the term "notice of appeal" in section 7266(a) to distinguish the filing a veteran makes at the Veterans Court from the one he makes at the board, which is called a "notice of disagreement." *See* 38 U.S.C. § 7105. There is not a scintilla of evidence in the legislative history to indicate that Congress used the term "notice of appeal" in section

7266(a) in order to equate the filing a veteran makes at the Veterans Court with the filing a litigant makes to appeal a final district court judgment. To the contrary, Congress uses the term "appeal" throughout Title 38 whenever it wishes to refer to a veteran's challenge to a prior determination, regardless of whether that determination is from the regional office or the board. *See, e.g.*, 38 U.S.C. § 7101 referring to the board as "the Board of Veterans' *Appeals*" (emphasis added)); *id.* at § 7104 (discussing "appeals" to the board); *id.* at § 7105(b)(2) ("Notices of disagreement, and *appeals* [to the board], must be in writing."); *id.* at § 7105(d)(5) ("The Board of Veterans' Appeals may dismiss any *appeal* which fails to allege specific error." (emphasis added)). To conclude that a notice of appeal to the Veterans Court is equivalent to a notice of appeal to a circuit court of appeals is to exalt semantics over substance. *See Henderson*, 22 Vet. App. at 223 (Schoelen, J., dissenting) ("I do not believe the Supreme Court's use of the term 'notice of appeal' in *Bowles* is interchangeable with the use of the term in 38 U.S.C. § 7266(a), and I remain unconvinced that *Bowles* compels the result reached today."); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").

It should be noted, moreover, that *Bowles* addresses the jurisdictional magnitude of Rule 4 of the Federal Rules of Appellate Procedure. *See* 551 U.S. at 208-10. The Federal Rules of Appellate Procedure, however, "govern appeals from Article III district courts" and

are "inapplicable to the [Veterans Court], an Article I Court." *Bailey*, 160 F.3d at 1367; *see also Oja v. Dep't of Army*, 405 F.3d 1349, 1359 (Fed. Cir. 2005) (concluding that the time limit to appeal to this court from the Merit Systems Protection Board is jurisdictional because such appeals are governed by the Federal Rules of Appellate Procedure). The Federal Rules of Appellate Procedure are "legislative in nature," *Bailey*, 160 F.3d at 1367, and it is therefore not surprising that the Supreme Court concluded in *Bowles* that Rule 4 was imbued with jurisdictional significance.

B. *The Brockamp Factors*

The Supreme Court has identified several factors as important in determining whether Congress intended equitable tolling to apply to a particular statutory time limit: (1) whether the language setting forth the time limit is unusually detailed or technical in nature, (2) whether a statute contains multiple iterations of the limitations period, (3) whether a timing provision contains explicit exceptions to the filing deadline, and (4) the underlying subject matter of the statutory scheme in which the timing provision is found. *See Brockamp*, 519 U.S. at 350-53; *Kirkendall v. Dep't of Army*, 479 F.3d 830, 836-37 (Fed. Cir. 2007) (en banc). Here, each of these factors strongly supports the conclusion that Congress intended for equitable tolling to apply to the limitations period contained in section 7266(a).

Appendix A

Section 7266(a)'s filing deadline is set forth in simple terms, eschewing the use of technical jargon to set forth the limitations period. *See Brockamp*, 519 U.S. at 350 ("Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception."); *Arctic Slope Native Ass'n*, 583 F.3d 785, 2009 U.S. App. LEXIS 21361, at *32-38 (concluding that the time for presenting a claim under the Contracts Disputes Act was subject to equitable tolling since the applicable timing provision was expressed in simple, non-technical language). Nor does section 7266(a) contain multiple iterations of the filing deadline. *Cf. Brockamp*, 519 U.S. at 350-51 (concluding that the time limit for seeking a tax refund was not subject to equitable exceptions where the statute "reiterate[d] its limitations several times in several different ways").

Moreover, section 7266(a) does not contain explicit exceptions to the time to file requirements. Applying the maxim *expressio unius est exclusio alterius*, the Supreme Court has made clear that the "explicit listing of exceptions" to the running of the limitations period must be considered by courts to be indicative of Congress' intent to preclude them from "read[ing] other unmentioned, open-ended, equitable exceptions into the statute." *Brockamp*, 519 U.S. at 352 (internal quotation marks omitted). In *Bowles*, the statute at issue already contained an explicit exception to the time to file requirements, allowing a district court to extend the filing period for fourteen days beyond the thirty-day period allotted to appeal a district court's final

judgment. *See* 28 U.S.C. § 2107(c). Here, in contrast, section 7266(a) "does not provide its own exceptions to the general rule" regarding when an action must be filed. *Bailey*, 160 F.3d at 1365; *see Arctic Slope Native Ass'n*, 583 F.3d 785, 2009 U.S. App. LEXIS 21361, at *32-38 (concluding that equitable tolling applies to a Contract Disputes Act timing provision which did not contain any express exceptions to the deadline for a contractor to submit claims).

By far the most important factor compelling the conclusion that equitable tolling applies to section 7266(a) is the fact that it is found in a uniquely pro-claimant adjudicatory scheme. *See Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) ("The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them."); *Bailey*, 160 F.3d at 1370 (Michel, J., concurring) (The Veterans Court is "set in a *sui generis* adjudicative scheme for awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend their country."). The 120-day filing period must be interpreted not in a vacuum, but with a keen awareness that Congress created the Veterans Court in order "to ensure that veterans . . . receive all benefits to which they are entitled." S. Rep. No. 100-418, 100th Cong., 2d Sess. 29 (1988).[4] Equitable tolling does not excuse tardy filing in

4. The Veteran's Court seems to have lost sight of its mandate when it took it upon itself to "overrule" *Bailey* and *Jaquay*. In eradicating equitable tolling based on *Bowles*, the (Cont'd)

cases of simple ineptitude or garden variety neglect, *see Nelson v. Nicholson*, 489 F.3d 1380, 1384 (Fed. Cir. 2007), but it is a critically important safeguard in situations where a serious mental or physical infirmity renders it impossible for a veteran to comply with a rigidly enforced filing deadline.

The impetus for the creation of the Veterans Court was Congress' abiding concern that individuals who had put their lives on the line through service in the military had no right to have their claims for disability benefits reviewed in a court of law. *See, e.g.*, S. Rep. No. 100-418, 100th Cong., 2d Sess. 30-31 ("Under current law, a veteran . . . aggrieved by a final [board] decision is left without any further recourse. . . . This legislation is designed to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives . . . every benefit and service to which he or she is entitled under law."); *id.* at 50-51 ("[T]he committee continues to believe that providing an opportunity for those aggrieved by VA decisions to have such decisions reviewed by a court, in a manner similar to that enjoyed by claimants before almost all other Federal agencies, is necessary in order to provide such claimants with fundamental justice. . . . [J]udicial

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(Cont'd)

Veterans Court conveniently overlooked the fact that *Bowles* did not cite to, much less overrule, any case involving section 7266(a). Indeed, even the government acknowledges that the Veterans Court acted inappropriately in failing to follow binding precedent of this court on the question of whether equitable tolling applies in Veterans Court proceedings.

review, by opening the decisions of the VA to court scrutiny, will have a salutary effect on such decisions and on the VA decisionmaking process in general by involving the judiciary as a check on agency actions."). Given Congress' clearly expressed desire to provide veterans with access to the judicial system, interpreting section 7266(a) in a way that will deprive those who are incapable of meeting rigidly enforced deadlines of the right to judicial review is "as unsupportable as it is counterintuitive." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158, 123 S. Ct. 748, 154 L. Ed. 2d 653 (2002) (concluding that time limits specified in the Coal Industry Retiree Health Benefit Act of 1992 should not be construed in a way that might deprive compensation to the intended beneficiaries of the statute).

When it established the Veterans Court, Congress made clear that proceedings before the court were not to be overly "formalized," but instead were to be "[a]ccurate, informal, efficient, and fair." H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 26 (1988). By eradicating equitable tolling, the majority creates a harsh and formalistic adjudicatory scheme that is the antithesis of what Congress intended. *See Forshey*, 284 F.3d at 1360 (Mayer, C.J., dissenting) ("Viewed in its entirety, the veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus.").

The majority's approach to equitable tolling is particularly indefensible given that most veterans act *pro se* when they file their petitions for review in the Veterans Court. *See* U.S. Court of Appeals for Veterans

Claims Annual Report (2008), *available at* http//www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf. The Supreme Court has cautioned that a strict reading of a filing provision is especially "inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) (internal quotation marks omitted). Because so many veterans must file their petitions without the assistance of counsel, it is highly unlikely that Congress intended for section 7266(a) to serve as a harsh and inflexible jurisdictional bar.

To the contrary, Congress has given every indication that it sanctions equitable tolling in proceedings before the Veterans Court. In 1998, *Bailey* held that section 7266(a) was subject to equitable tolling. 160 F.3d at 1364-68. In the eleven years since *Bailey*, Congress has had ample opportunity to overturn the application of tolling in Veterans Court proceedings, but has declined to do so. Instead, in 2000, Congress enacted comprehensive revisions to the veterans' benefits system, *see* Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, but did nothing to eliminate or circumscribe equitable tolling at the Veterans Court. In 2001, Congress specifically reviewed and then amended section 7266, repealing a provision that required a veteran to serve a notice of appeal on the Veterans Administration. *See* Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, § 507, 115 Stat. 976, 999. Again, however, Congress chose not to

disturb established equitable tolling jurisprudence. Under such circumstances, it is reasonable to assume that Congress agrees with equitable tolling in Veterans Court proceedings. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 699, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress [is] thoroughly familiar" with important court decisions when it enacts legislation.); *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 1978) ("Congress is presumed to be aware of court decisions construing statutes and may, of course, amend a statute as a result.").

Statistics from the Veterans Court make clear that the elimination of equitable tolling will deal a heavy blow to many deserving veterans. In 2008, the Veterans Court heard 3,542 appeals on the merits and reversed, vacated or remanded 2,184 of the board's decisions. *See* U.S. Court of Appeals for Veterans Claims Annual Report (2008), *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_-_20081. pdf. Thus, veterans often mount successful challenges to adverse board decisions when they come before the Veterans Court. With the eradication of equitable tolling, many deserving veterans will be deprived of the right to have an erroneous board decision corrected on appeal. *See* Br. of Amicus Curiae United Spinal Assoc. at 14 (noting that since the Veterans Court abolished equitable tolling "it has dismissed over 130 appeals based on the inability of claimants to meet the filing requirements of § 7266, an average of over two dismissals a week").

While the abolition of equitable tolling will prove calamitous for many severely disabled veterans, its continuance would result in no prejudice to the government. All factual information must be presented during earlier proceedings, so a delay in bringing an action in Veterans Court will not hinder the government's ability to obtain evidence or present its case. *Bailey*, 160 F.3d at 1365 (Since section 7266(a) "addresses timeliness for an appeal from a closed record," the application of equitable tolling "does not threaten administrative complexity or unpredictable fiscal peril."). And because it often takes many years—in some cases several decades—to obtain service-connected benefits, the government is hardly in a position to complain that equitable tolling will result in inordinate delays. *See* James Dao, "Veterans Affairs Faces Surge of Disability Claims," N.Y. Times, July 12, 2009 (noting that the backlog of claims seeking service-connected benefits is now over 400,000); *Comer v. Peake*, 552 F.3d 1362, 1365-71 (Fed. Cir. 2009) (summarizing the hurdles faced by a mentally disabled veteran in his twenty-year struggle to obtain disability compensation).

This court often pays lip-service to "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *See King*, 502 U.S. at 220 n.9; *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994). In reality, however, it not infrequently fails in its "fundamental obligation to apply the law, when the issue is an open one, in favor of the veteran." *Schism v. United States*, 316 F.3d 1259, 1311 (Fed. Cir. 2002) (Plager, J.,

dissenting). Even if this were a close case, which it is not, we would be obliged to resolve any interpretive doubt regarding whether equitable tolling applies to section 7266 in the veteran's favor. *Cf. Kirkendall*, 479 F.3d at 843.

IV.

Four justices of the Supreme Court thought the result in *Bowles* was fundamentally unfair. *See* 551 U.S. at 215 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting) ("It is intolerable for the judicial system to treat people this way."). The facts here are far more compelling. Bowles was a convicted murderer, and had a jury trial, a direct appeal and a federal district court review of his habeas corpus application. His untimely filing resulted only in the loss of the right to have the denial of his habeas petition reviewed by an appellate court.

Henderson was discharged from active military duty due to service-connected paranoid schizophrenia. His psychiatrist reports that he is "incapable of rational thought or deliberate decision-making" and "incapable of understanding and meeting deadlines." A1028. Acting *pro se*, Henderson filed an action challenging the board's decision denying him monthly compensation for at-home care, but his complaint was dismissed because it was filed a mere fifteen days outside the 120-day filing period specified in section 7266(a). Because the majority has seen fit to renounce equitable tolling, Henderson will be deprived of all right to judicial review of his claim. So

while *Bowles*, a convicted murderer, had several opportunities to present his case in a court of law, Henderson will have none.

The majority does not dispute that Henderson's mental illness rendered him incapable of meeting section 7266(a)'s filing deadline. Nor can it dispute that Bowles does not mention, much less explicitly overrule, this court's well-established precedent applying equitable tolling in proceedings before the Veterans Court. Yet the majority construes *Bowles* in a way that will deprive many deserving veterans of all right to judicial review. But "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service . . . ." *Porter v. McCollum*, No. 08-10537, 130 S. Ct. 447, 175 L. Ed. 2d 398, 2009 U.S. LEXIS 8377, at *22-23 (U.S. Nov. 30, 2009). Eliminating equitable tolling deprives deserving veterans of the leniency they are due and makes a mockery of the pro-claimant adjudicatory system Congress intended to create. Those "who have been obliged to drop their own affairs to take up the burdens of the nation" through service in the military, *Boone v. Lightner*, 319 U.S. 561, 575, 63 S. Ct. 1223, 87 L. Ed. 1587 (1943), deserve far better.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DECIDED JULY 24, 2008

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-0090.

David L. HENDERSON,

Appellant,

v.

James B. PEAKE, M.D.,
Secretary of Veterans Affairs,

Appellee.

Argued Nov. 17, 2007.
Decided July 24, 2008.

Before GREENE, Chief Judge, and HAGEL and SCHOELEN, Judges.

GREENE, Chief Judge:

Before the Court is Mr. Henderson's appeal of an August 30, 2004, decision of the Board of Veterans' Appeals (Board) that denied entitlement to Department of Veterans Affairs (VA) special monthly compensation. Mr. Henderson's Notice of Appeal (NOA) was received

on January 12, 2005, more than 120 days after the Board decision was mailed. Consequently, he was ordered to show cause why his appeal should not be dismissed as untimely. Mr. Henderson requested that the time for filing his NOA to the Court be extended because his VA service-connected disability prevented him from timely filing his appeal of the Board decision. Subsequently, Mr. Henderson was ordered to provide additional information, including medical or other evidence, to support a basis for equitable tolling as authorized under *Barrett v. Principi*, 363 F.3d 1316 (Fed.Cir.2004). In response, Mr. Henderson submitted a letter from his private psychiatrist describing the effects of his disability. After considering the evidence submitted, in a single judge order the Court dismissed the appeal for lack of jurisdiction.

Mr. Henderson sought reconsideration of the dismissal and that request was granted. The matter was submitted to a panel for disposition. During the pendency of the appeal, the United States Supreme Court decided *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), which addressed whether filing an NOA is a jurisdictional requirement in Federal appellate courts, and thus, cannot be equitably tolled. In light of that decision, the Court ordered the parties to submit supplemental memoranda of law. Subsequent to those filings, Mr. Henderson submitted a Notice of Supplemental Authority pursuant to Rule 30(b) of the Court's Rules of Practice and Procedure. The Secretary moved to strike Mr. Henderson's Notice of Supplemental Authority on the grounds that it does not comply with

Rule 30(b). The Secretary's pending motion to strike portions of Mr. Henderson's Notice of Supplemental Authority will be denied as moot.

Oral argument regarding this matter was held on November 16, 2007. Mr. Henderson argues that *Bowles* does not disturb the precedent established in *Bailey v. West*, in which the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that equitable tolling is available for NOAs filed at this Court. *See* 160 F3d 1360 (Fed.Cir.1998). The Secretary maintains that *Bowles* has created a bright-line rule that equitable tolling can no longer excuse untimely NOAs in this Court. It is the question rising from these positions that the Court now considers.

In *Bowles*, Mr. Bowles petitioned a U.S. district court to permit him, under rule 4(a)(6) of the Federal Rules of Appellate Procedure, which are statutorily enacted rules, to file an appeal after the time prescribed by statute for such an appeal had expired. Rule 4(a)(6) permits a district judge to extend the time to file an appeal for a period of 14 days from the day the district court grants the motion. *See* 28 U.S.C. § 2107(c). In granting Mr. Bowles's motion, the district court erroneously and inexplicably gave Mr. Bowles 17 days to file his appeal rather than the statutorily prescribed 14 days. Mr. Bowles filed his NOA 16 days later, one day earlier than prescribed by the district court, but two days after the 14 day period provided by statute had expired. The respondent in *Bowles* argued that the United States Court of Appeals for the Sixth Circuit

lacked jurisdiction to hear Mr. Bowles's appeal because it was filed beyond the 14-day period prescribed by statute. The Supreme Court agreed. *Bowles*, 127 S.Ct. at 2363 ("This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.' " (citations omitted)). After considering and distinguishing several situations that do not qualify as jurisdictional time limits,[1] the Supreme Court held unequivocally: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.* at 2366. With this mandate, we review the statutes authorizing this Court to conduct its judicial appellate review.

First, just as Congress created appellate courts in each circuit as "a court of record, known as the United States Court of Appeals for the circuit" under Article III of the Constitution, 28 U.S.C. § 43(a), this Court was established under Article I as "a court of record to be known as the United Stated Court of Appeals for

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1. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (holding that employee numerosity requirement was statutory limitation, not time limit); *Scarborough v. Principi*, 541 U.S. 401, 413, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004) (finding that court had plenary jurisdiction over matters ancillary to judgment of court, including application for fees under Equal Access to Justice Act); *Kontrick v. Ryan*, 540 U.S. 443, 448, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (holding that failure to comply with Federal Rule of Bankruptcy procedure was not jurisdictional because such rules were not statutory, but were rules issued by court for orderly transaction of its business).

Veterans Claims," 38 U.S.C. § 7251. Second, it is well settled that the proceedings of this Court are "civil actions." *See Scarborough*, 541 U.S. at 413, 124 S.Ct. 1856 (applying Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), to this Court and specifically referring to underlying action as "*civil action*"); *see also Abbs v. Principi*, 237 F.3d 1342, 1348 (Fed.Cir.2001) (*civil actions* against VA are brought in Court of Appeals for Veterans Claims). Third, this Court's appellate jurisdiction derives exclusively from statutory grants of authority enacted by Congress and may not be extended beyond that permitted by law. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). The time to file an appeal in this Court is prescribed by statute, not by a Court rule. *See* 38 U.S.C. § 7266(a). To obtain appellate review in this Court, an NOA must be filed with the Court within 120 days after notice of the Board decision is mailed to an appellant. *Id.* The ultimate burden of establishing jurisdiction rests with the appellant. *See McNutt v. G.M.A.C.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Bethea v. Derwinski*, 2 Vet.App. 252 (1992).

In *Bailey*, 160 F.3d at 1365, the Federal Circuit held that the part of section 7266 governing this Court's review authority was subject to equitable tolling under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (once Congress has waived sovereign immunity, rule of equitable tolling is applicable in same way it would be in private suits). It did so on the basis that section 7266

was more like a statute of limitations in nature than a jurisdictional requirement and that the Supreme Court had not provided a distinction between the two. *Bailey*, 160 F.3d at 1364 ("*Irwin* does not distinguish among the various kinds of time limitations that may act as conditions to the waiver of sovereign immunity required to permit a cause of action to be pitched against the United States.").

In *Bowles*, the Supreme Court provided the distinction between statutes of limitation and jurisdictional requirements not found in *Irwin* and held that in civil cases statutory time periods limiting the time for filing an NOA are jurisdictional in the strict sense and are not subject to equitable tolling. *Bowles*, 127 S.Ct. at 2365. The *Bowles* opinion emphasized that its reasoning was based on the statutory origin of the time limitation and thus made clear that timelimits expressed in statutes for filing an appeal limit subject-matter jurisdiction. *Id.* Specifically, the Supreme Court held: "[T]he timely filing of [an NOA] in a civil case is a jurisdictional requirement," and courts have "no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 2366.

We recognize the beneficent foundation that, in part, led the Federal Circuit to apply equitable tolling to the 120-day judicial-appeal filing period for NOAs to this Court. *See Bailey*, 160 F.3d at 1365 (appellant's reliance on VA employee's statement that appeal would be processed was sufficient for equitable tolling of

judicial-appeal period after VA employee failed to timely file appeal with Court). Later, the Federal Circuit further expanded equitable tolling of the time period established in section 7266(a) to situations including physical and mental illness that prevents a veteran from timely filing an NOA. *See Arbas v. Nicholson*, 403 F.3d 1379 (Fed.Cir.2005); *Barrett*, 363 F.3d 1316. However, *Bowles* establishes that the premise upon which the Federal Circuit in *Bailey* and its progeny applied *Irwin* to the time period established in section 7266(a) can no longer stand. According to *Bowles*, although a simple "claim-processing rule" may be waived or equitably tolled, 127 S.Ct. at 2364, "the taking of an appeal in a civil case within the time prescribed by statute is 'mandatory and jurisdictional'," *id.* at 2363 (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam)). This Court's appellate review of Board decisions is distinguishable from the type of case considered in *Irwin*, where the petitioner who was seeking equitable tolling had filed against a Federal agency in a U.S. Federal district court, a complaint, not an NOA. *See Irwin*, 498 U.S. at 96, 111 S.Ct. 453 (statutes of limitations in actions against Government are subject to same rebuttable presumption of equitable tolling applicable to suits against private defendants). Congress has specifically authorized this Court to conduct, upon receipt of a statutorily required and timely filed NOA, independent judicial*appellate review* of a Federal agency decision. *See*38 U.S.C. §§ 7252 (granting Court exclusive jurisdiction to review decisions of Board), 7261 (limiting

scope of Court's review), and 7266(a) (review of Board decision initiated by NOA); *Frankel v. Derwinski*, 1 Vet.App. 23, 25 (1990) (examining Court's authority as appellate court); *see also*H.R.Rep. No. 100-963, at 4 (1988) (purpose of creating Veterans Court was to "establish an independent court" to review Board decisions). While *Irwin* applies to the equitable tolling of claims-processing rules, *Bowles* unequivocally provides the rule for the statutory appeal period governing judicial appeals to this Court.[2] *See Bowles*, 127 S.Ct. at 2363.

The same legislation that created this Court also contained provisions for the filing of administrative appeals within the Agency and explicitly permitted relief from prescribed appeal periods within the Agency. *See, e.g.*, 38 U.S.C. § 7105(b), (c) (permitting Secretary to prescribe regulations to allow claim even if appeal

2. Although the Supreme Court has recently stated in *John R. Sand & Gravel v. U.S.* that *Irwin* survives after the *Bowles* decision, it must also be read to bar any extension of *Irwin* to NOAs filed at this Court. *See* 552 U.S. 130, 128 S.Ct. 750, 752, 169 L.Ed.2d 591 (2008) (anomaly created by *Irwin* and other cases merely reflects "a different judicial assumption about the comparative weight Congress would likely have attached to competing national interests"). Following the Supreme Court's guidance in *John R. Sand & Gravel*, the section 7266(a) 120-day period to file an NOA in this Court is properly classified as a jurisdiction conferring statute because it represents a limitation on a governmental waiver of sovereign immunity and is not designed to protect a defendant's "case specific interest in timeliness," as is the case with a claims-processing rule or statute of limitations. *Id.* at 753.

period has expired), (d)(3) (stating that 60-day period prescribed for filing "formal appeal" with Board of Veterans' Appeals "may be extended for a reasonable period on request for good cause shown"). Contrasting these provisions with the clear and unqualified time limit prescribed in section 7266(a) for appeals to this Court, we can draw no other conclusion than that, for the civil cases arising from appeals to this Court, there are no equitable exceptions to the 120-day judicial appeal period established by section 7266(a). *See Bowles, supra.*

We also recognize that even after *Bowles,* because an appeal to this Court is the first opportunity for an appellant to have his claim considered by a judicial body that is independent of the executive agency deciding his claim, one might be tempted to analogize the period provided to file such an appeal to a statute of limitations. However, the clarity and forcefulness with which *Bowles* speaks regarding the jurisdictional importance of congressionally imposed periods of appeal, requires us to abandon any such effort. To answer the questions posed by the dissent, as then—Circuit Judge Scalia stated in *National Black Media Coalition v. Federal Communications Commission*, no matter how compelling the circumstances, if a court does not have jurisdiction, it cannot act on a matter. *See*760 F.2d 1297, 1300 (D.C.Cir.1985).

Accordingly, Mr. Henderson's untimely NOA must be dismissed for lack of jurisdiction. *See Bowles,* 127 S.Ct. at 2366 ("[W]hen an 'appeal has not been prosecuted in the manner directed, within the time

limited by the acts of Congress, it must be dismissed for want of jurisdiction.' " (quoting *U.S. v. Curry*, 47 U.S. 106, 113, 6 How. 106, 12 L.Ed. 363 (1848))). Additionally, the Secretary's motion to strike portions of Mr. Henderson's Notice of Supplemental Authority is denied as moot.

Upon consideration of the foregoing, Mr. Henderson's appeal of the August 30, 2004, Board decision is DISMISSED.

GREENE, Chief Judge, filed the opinion of the Court.

Appendix B

SCHOELEN, Judge, dissenting:

Although I commend the majority for its lucid treatment of the issue before the Court, I must write separately because I do not believe the majority's analysis proceeds from the proper foundation. The Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) does not change the basis for the Court's authority to apply equitable tolling to 38 U.S.C. § 7266(a). The Court should apply existing precedent to evaluate whether equitable tolling is warranted in this case to excuse the late filing of the appellant's NOA. In the alternative, the majority should explain why its departure from existing precedent also forecloses equitable tolling on grounds different from those currently in force.

The majority acknowledges that in *Bailey v. West*, 160 F.3d 1360 (Fed.Cir.1998) (en banc) the Federal Circuit held that section 7266(a) was subject to equitable tolling, but the majority characterizes that holding as being "on the basis that section 7266 was more like a statute of limitations in nature than a jurisdictional requirement and that the Supreme Court had not provided a distinction between the two." *Ante* at 219 (citing 160 F.3d at 1364). The majority goes on to state that "[i]n *Bowles*, the Supreme Court provided the distinction between statutes of limitation and jurisdictional requirements not found in *Irwin [v. Department of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)] and held that in civil cases statutory time

periods limiting the time for filing an NOA are jurisdictional in the strict sense and are not subject to equitable tolling." *Ante* at 219 (citing *Bowles*, 127 S.Ct. at 2365). I do not believe that *Bowles* provides any such distinction or adds any clarity to this area of the law, and I believe the majority's analysis overlooks several significant aspects of *Bowles*, *Bailey*, and this Court's place in the adjudication of veterans benefits claims.

Basing its analysis on *Irwin*, the Federal Circuit in *Bailey* concluded that, "absent a contrary congressional expression, the Court [of Appeals for Veterans Claims] would be entitled to toll the statute of limitations found in section 7266." 160 F.3d at 1365. Here, the majority explains that recent Supreme Court precedent has stated that *Irwin* "survives" *Bowles* (*ante* at 220, n. 2 (citing *John R. Sand & Gravel v. United States*, 552 U.S. 130, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008))), but the majority then concludes that section 7266(a) "is properly classified as a jurisdiction conferring statute because it represents a limitation on a governmental waiver of sovereign immunity and is not designed to protect a defendant's 'case specific interest in timeliness,' as is the case with a claims processing rule or statute of limitations." *Ante* at 220, n. 2 (citing *John R. Sand & Gravel*, 128 S.Ct. at 753). The majority's explanation of *Irwin's* continued role in equitable tolling jurisprudence does not explain how *Bowles*—or any other case—changes the analysis of the governmental waiver of sovereign immunity that the Federal Circuit undertook in *Bailey*, and reaffirmed in *Jaquay v.*

Principi, 304 F.3d 1276 (Fed.Cir.2002) (en banc) and in *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 842-44 (Fed.Cir.2007) (en banc), *cert. denied*, __ U.S. __, 128 S.Ct. 375, 169 L.Ed.2d 260 (2007).[1] Indeed, in *Bailey*, the Federal Circuit stated that "courts have recognized statutes of limitations as *limits to grants of jurisdiction*," 160 F.3d at 1363 (emphasis added), and confirmed that analysis of section 7266 in this regard required the court to "go beyond the placement and nomenclature that Congress chose to express the metes and bounds of the *waiver of immunity*." *Id.* (emphasis added). I believe that language signifies that the *Bailey*

1. The majority states that *John R. Sand & Gravel* explains that any "anomaly created by *Irwin* and other cases merely reflects 'a different judicial assumption about the comparative weight Congress would likely have attached to competing legitimate interests.' " *Ante* at 220, n. 2 (citing *John R. Sand & Gravel*, 128 S.Ct. at 750).*John R. Sand & Gravel* does state that proposition, but it does so in the context of reaffirming *Irwin* and explaining that *Irwin* did not create a conflict with an older line of cases sufficiently grave to justify concluding that the older cases were overruled. *See John R. Sand & Gravel*, 128 S.Ct. at 755 (describing the critical difference between the statute reviewed in *Irwin* and the statute reviewed in *John R. Sand & Gravel*: The statute in *Irwin*, "while similar to the present statute in language, is unlike the present statute in the key respect that the Court had not previously provided a definitive interpretation"). Thus, the discussion in *John R. Sand & Gravel*, cited by the majority, amounts to a reaffirmation, through *stare decisis*, of *Irwin*, as well as the cases upon which the *John R. Sand & Gravel* holding was based. I therefore conclude that, rather than undermining or narrowing *Irwin* and cases based upon it, *John R. Sand & Gravel* reaffirms *Irwin's* vitality.

decision already explored the jurisdictional nature and scope of the waiver of sovereign immunity of section 7266(a), and this Court should follow that analysis.

The majority instead concludes that *Bowles* supersedes this sovereign immunity analysis because *Bowles* holds that "[t]he timely filing of [an NOA] *in a civil case* is a jurisdictional requirement," *ante* at 219 (emphasis added) (quoting *Bowles*, 127 S.Ct. at 2366), and proceedings at this Court are "civil actions," *ante* at 219. I have two objections to the majority's determinations in this regard.

First, I believe the majority reads *Bowles* without sufficient consideration of the statutory scheme that *Bowles* actually addresses. *Bowles* is about the jurisdiction of the United States Courts of Appeals constituted under Article III of the Constitution. Those courts "shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. *Bowles* addresses Rule 4 of the Federal Rules of Appellate Procedure, of which section 4(a) governs appeals in civil cases and section 4(b) governs appeals in criminal cases. *See* FED. R.APP. P. 4. Rule 4, according to *Bowles*, "carries [28 U.S.C.] § 2107 into practice." *Bowles*, 127 S.Ct. at 2363.Section 2107 of title 28, U.S.Code, in turn provides that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals . . . unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree,"

28 U.S.C. § 2107(a), and also provides a mechanism by which a district court may "upon motion . . . extend the time for appeal upon a showing of excusable neglect or good cause . . . for a period of 14 days from the date of entry of the order reopening the time for appeal." 28 U.S.C. § 2107(c). Section 2107 makes no mention of criminal proceedings.

This entire construct depends on the prior issuance of a final decision of a U.S. district court. Rule 4 and section 2107 are not implicated until there is a final decision of a district court, according to section 1291. Once the district court's decision is final, should a party wish to appeal, the timing provisions of Rule 4 and section 2107 become relevant, and only then does it matter whether the case is a civil case or a criminal case because that distinction triggers the applicability (or not) of section 2107 and Rule 4(a)—and by extension the applicability of the holding in *Bowles*. Thus, *Bowles* governs the jurisdiction of an Article III appellate court reviewing a final decision of a district court in a civil, rather than criminal, case.

Furthermore, *Bailey* already includes analysis enabling this Court to distinguish the holding of *Bowles* from our jurisprudence: The Federal Circuit stated that Federal Rules of Appellate Procedure 4 and 26(b), as well as 28 U.S.C. § 2107, "govern appeals from Article III district courts and are inapplicable to the Court of [Appeals for Veterans Claims], an Article I court." *See Bailey*, 160 F.3d at 1367. This Court is not a district court or court of appeals constituted under Article III,

nor is the Board of Veterans' Appeals—the adjudicative body whose decisions this Court reviews—an Article III district court. *See* 38 U.S.C. § 7252(a) Although I agree with the majority's characterization of the proceedings in this Court as "civil," I do not believe that use of the term "civil case" in *Bowles* equates this Court's proceedings to those proceedings at issue in *Bowles* because *Bowles* deals with the Article III courts' appellate mechanism in civil cases, which differs from the mechanism by which cases are brought to this Court. As a consequence, I do not believe the Supreme Court's use of the term "notice of appeal" in *Bowles* is interchangeable with the use of the term in 38 U.S.C. § 7266(a), and I remain unconvinced that *Bowles* compels the result reached today. *See Joaquay*, 304 F.3d at 1286 ("[T]he filing of a notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first action taken by a veteran in a court of law."); *see also* 38 U.S.C. § 7292(a) (stating that review of this Court's decisions by the Federal Circuit "shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeals to United States courts of appeals from United States district courts").[2]

2. Indeed, if anything, *Bowles* supports the Federal Circuit's practice of refusing to allow equitable tolling for appeals from this Court to the Federal Circuit, as the statute governing those appeals dictates that they be undertaken "within the time and in the manner prescribed for appeals to United States courts of appeals from United States district courts." 38 U.S.C. § 7292(a); *see also Oja v. Dep't of the Army*, 405 F.3d 1349, 1358 (Fed.Cir.2005).

Appendix B

My second objection to the majority's approach is that, once the majority concludes that *Bowles* has superseded *Bailey* and, by extension, *Irwin*, it fails to account for the possibility that other grounds may exist to support equitable tolling of section 7266(a)'s deadline. In *Bailey*, the Federal Circuit noted that, since the introduction of judicial review of VA benefits determinations wrought by the Veteran's Judicial Review Act, Pub.L. No. 100-687, 102 Stat. 4105 (1988), "it appears the system has changed from 'a nonadversarial, *ex parte*, paternalistic system for adjudicating veterans' claims,' to one in which veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review." *Bailey*, 160 F.3d at 1365 (quoting *Collaro v. West*, 136 F.3d 1304, 1309-10 (Fed.Cir.1998)). Also, concurring in *Bailey*, Judge Michel explained that the Court of Appeals for Veterans Claims "operates in a unique, paternalistic administrative environment," *Bailey*, 160 F.3d at 1368 (Michel, J., concurring), and that the *Bailey* decision itself "should be understood as derived from this uniquely benevolent statutory framework," *id.* at 1369. He summarized his views by stating that

> [t]he Board of Veterans' Appeals, of course, is not a trial court and the Court of [Appeals for Veterans Claims], while surely an appellate court, is an Article I court set in a sui generis adjudicative scheme for awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend

> their country. This entire scheme is imbued with special beneficence from a grateful sovereign. On this basis alone, I would allow tolling by the Court of [Appeals for Veterans Claims].

Id. at 1370.

The majority alludes to such statements by "recogniz[ing] the beneficent foundation that, in part, led the Federal Circuit to apply equitable tolling," *ante* at 220, but finds it insufficient as a basis to reject the *Bowles* construction of "the jurisdictional importance of congressionally imposed periods of appeal," *ante* at 221. As I explained above, an appeal in the Article III courts is fundamentally different from an appeal to this Court. I suggest that this Court should confront that difference, and should account for the fact that it is "set in a sui generis adjudicative scheme," *id.*, and that, in order to obtain review in this Court, a claimant must "satisfy formal legal requirements, often [and, as in this case when Mr. Henderson filed his NOA,] without the benefit of legal counsel." *Bailey*, 160 F.3d at 1365. In creating this Court to provide judicial review of final decisions of the Board of Veterans' Appeals, did Congress truly intend for this Court's jurisdiction to be limited by a temporal restriction in the face of extraordinary circumstances, in the same way that the Article III courts of appeals' jurisdiction is limited?

Appendix B

The Supreme Court has held that interpretive doubt in veterans benefits statutes should be resolved in the veteran's favor. *See Brown v. Gardner*, 513 U.S. 115, 117-18, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991); *see also Kirkendall*, 479 F.3d at 843 ("Even if this were a close case . . . the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that [the statute in question] is subject to equitable tolling."). For the reasons described above, I have doubts that Congress intended this Court's review to be circumscribed in the way the Court today concludes it must be. When there is doubt, should we not construe the statute in the veteran's favor?

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DATED AUGUST 3, 2007

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-0090

DAVID L. HENDERSON,

APPELLANT,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before GREENE, *Chief Judge*, and HAGEL and SCHOELEN, *Judges*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

In a March 14, 2006, single-judge decision, the Court dismissed Mr. Henderson's appeal of an August 30, 2004, decision of the Board of Veterans' Appeals as untimely after determining that equitably tolling the 120-day appeal period for filing a Notice of Appeal provided by 38 U.S.C. § 7266(a) was not warranted. Mr. Henderson

filed a motion for reconsideration or, in the alternative, for a panel decision. The motion for reconsideration was granted and the matter was submitted to a panel. Subsequently, the parties submitted additional evidence and argument concerning the issue of equitable tolling based on mental illness or physical disabilities. While the matter continued on appeal, the Supreme Court of the United States held that the "timely filing of a notice of appeal in a civil case is a jurisdictional requirement" and Federal courts have no authority to create equitable exceptions to jurisdictional requirements. *Bowles v. Russell*, 127 S.Ct. 2360, 2366 (2007).

Accordingly, the parties are ordered to prepare supplemental memoranda of law to specifically discuss the following issue:

> What effect, if any, does *Bowles* have on the line of cases currently allowing for equitable tolling of the time limitations prescribed for filing an appeal under 38 U.S.C. § 7266(a)?

Upon consideration of the foregoing, it is

ORDERED that, not later than 14 days after the date of this order, Mr. Henderson file and serve on the Secretary a supplemental memorandum of law of 10 pages or fewer, addressing the above issue. It is further

ORDERED that, not later than 14 days after service of Mr. Henderson's supplemental memorandum of law, the Secretary file and serve on Mr. Henderson a

supplemental response of 10 pages or fewer, addressing the above issue. It is further

ORDERED that, not later than 28 days after the date of this order, any interested amicus curiae may file a supplemental memorandum of law of 10 pages or fewer, addressing the above issue.

DATED: AUG 3 - 2007 PER CURIAM.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DATED OCTOBER 31, 2006

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-0090

DAVID L. HENDERSON,

APPELLANT,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before GREENE, *Chief Judge*

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On January 12, 2005, the Court received the appellant's Notice of Appeal (NOA) from an August 30, 2004, decision of the Board of Veterans' Appeals (Board). On January 31, 2005, the appellant was ordered to explain why his appeal should not be dismissed as untimely. On February 7, 2005, the appellant responded stating that medication he was taking had caused him to be unable to timely file his NOA.

Appendix D

On July 5, 2005, the Court ordered the appellant to file a response showing that a medically-diagnosed illness was the cause of his failure to file a timely NOA. On September 15, 2005, the appellant provided a statement from his physician reporting that his medical and psychiatric impairments make him incapable of rational thought or deliberate decision making, and unable to handle his own affairs or function in society on his own.

On March 14, 2006, in a single-judge decision, the Court determined that tolling the 120-day appeal period was not appropriate and dismissed the January 2005 NOA as untimely. After the Court granted three extensions of time, on July 17, 2006, the appellant filed a motion for reconsideration or, in the alternative, for a panel decision.

Upon consideration of the foregoing, it is

ORDERED, that the March 14, 2006, order is REVOKED. It is further

ORDERED, that the motion for reconsideration is granted. It is further

ORDERED, that the Clerk of the Court is directed to submit this issue to a panel for consideration.

DATED: October 31, 2006

BY THE COURT:
s/ William P. Greene, Jr.
WILLIAM P. GREENE, JR.
Chief Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DATED MARCH 14, 2006

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-0090

DAVID L. HENDERSON, APPELLANT,

V.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENE, *Chief Judge.*

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On January 12, 2005, the Court received the appellant's Notice of Appeal (NOA) from an August 30, 2004, decision of the Board of Veterans' Appeals (Board). On January 31, 2005, the appellant was ordered to explain why his appeal should not be dismissed as untimely. On February 7, 2005, the appellant responded to the Court's order stating that because the medication he was taking for his back problems left him "sleepy" and "confused" he had been unable to timely file his NOA. Subsequently, the Court issued an order stating that in order to obtain the benefit of equitable tolling

the appellant must show that the failure to file a timely appeal was the direct result of a mental or physical illness that rendered him incapable of rational thought, deliberate decision making, handling his own affairs, or functioning in society. *See Henderson v. Nicholson*, U.S. Vet.App. No. 05-90 (July 5, 2005, order) (citing *Arbas v. Nicholson*, 403 F.3d 1379 (Fed. Cir. 2005) and *Barrett v. Principi*, 363 F.3d 1316 (Fed. Cir. 2004)). The Court directed the appellant to file a response to the order providing medical or other evidence satisfying the equitable-tolling burden. *Id.*

In response to the Court's order, Mr. Henderson submitted a letter from his psychiatrist, Dr. Raouf Badawi, who stated:

> In addition to the fact that [Mr. Henderson] is a chronic paranoid schizophrenic who has a seizure disorder, he is also hypertensive and experiences chronic severe lower back pain. Recently, he was placed by his local physician on Hydrocodone, a narcotic, which further compromised his memory and ability to function. He has been spending most of his time sleeping since the Hydrocodone was added to his medication. In effect, [Mr. Henderson] has a variety of medical and psychiatric impairments that make him incapable of rational thought or deliberate decision making, and he is unable to handle his own affairs or [function] in society without much help from his wife.

Attachment at 1.

Appendix E

This Court's appellate jurisdiction derives exclusively from statutory grants of authority provided by Congress and may not be extended beyond that permitted by law. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). The ultimate burden of establishing jurisdiction rests with the appellant. *See McNutt v. G.M.A.C.*, 298 U.S. 178 (1936); *Bethea v. Derwinski*, 2 Vet.App. 252 (1992). To be timely under Rule 4 of this Court's Rules of Practice and Procedure and precedents construing 38 U.S.C. § 7266(a), an NOA must be filed with the Court within 120 days after the notice of the Board decision is mailed to an appellant.

In limited circumstances, the statutory period prescribed for the filing of an NOA may be equitably tolled. *See, e.g., Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Arbas*, 403 F.3d at 1381 (equitable tolling of 120-day filing period may be justified if veteran shows that failure to file timely was direct result of physical illness); *Barrett*, 363 F.3d at 1321 (equitable tolling of 120-day filing period may be justified if veteran shows that failure to file timely was direct result of mental illness); *Bailey v. West*, 160 F.3d 1360, 1364 (Fed. Cir. 1998) (en banc) (equitable tolling of 120-day filing period may be warranted where VA misled or induced claimant into missing filing deadline). In *Barrett*, the United States Court of Appeals for the Federal Circuit concluded that the following standards govern claims of untimely filing due to mental incapacity:

Appendix E

> [T]o obtain the benefit of equitable tolling, a veteran must show that the failure to file was the direct result of a mental illness that rendered him incapable of "rational thought or deliberate decision making," or "incapable of handling [his] own affairs or unable to function [in] society." A medical diagnosis alone or vague assertions of mental problems will not suffice. And, if he is represented by counsel during the relevant period, the veteran must make an additional showing that the mental illness impaired the attorney-client relationship.

Barrett, 363 F.3d at 1321 (citations omitted).

In this case, Mr. Henderson has shown that his mental illness and medical impairments rendered him incapable of rational thought or deliberate decision making and unable to handle his own affairs or function in society, but he has not met the burden of demonstrating that his failure to file a timely NOA was the *direct result* of either his mental illness or physical condition. *See id*; *Arbas*, *supra*. An incapacitating mental or physical illness by itself is not sufficient for equitably tolling the judicial appeal period. *See Barrett*, *supra*; *Claiborne v. Nicholson*, 19 Vet.App. 181, 185-86 (2005) (equitable tolling not appropriate when appellant failed to establish that his failure to file timely NOA was "direct result" of his mental illness); *McCreary v. Nicholson*, 19 Vet.App. 324, 331 (2005) (appellant must establish causal link between mental or physical illness

and untimely filing). Here, Mr. Henderson has not shown how a mental or physical illness caused his NOA to be untimely. Thus, although the Court is sympathetic to the difficulties faced by the appellant, tolling the 120-day appeal period is not appropriate. *See Irwin*, 498 U.S. at 89; *Bailey*, 160 F3d 1360; *see also Arbas* and *Barrett*, both *supra*. Accordingly, the NOA is untimely and, therefore, there is no jurisdiction to entertain this appeal.

Upon consideration of the foregoing, it is

ORDERED that this appeal is DISMISSED for lack of jurisdiction.

DATED: March 14, 2006

BY THE COURT:

s/ William P. Greene, Jr.
William P. Greene, Jr.
Chief Judge

APPENDIX F — OPINION OF THE BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS DATED AUGUST 30, 2004

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

C 16 960 578

IN THE APPEAL OF
DAVID L. HENDERSON

DOCKET NO. 03-24 052

DATE AUG 30 2004

On appeal from the
Department of Veterans Affairs (VA) Regional Office (RO)
in Winston-Salem, North Carolina

THE ISSUE

Entitlement to special monthly compensation (SMC) based on the need for the regular aid and attendance or being housebound.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

ATTORNEY FOR THE BOARD

J. Barone, Associate Counsel

Appendix F

INTRODUCTION

The veteran had active military service from September 1950 to June 1952.

This matter comes before the Board of Veterans' Appeals (Board) from a rating decision of the RO.

The veteran was scheduled to testify before a Veterans Law Judge in Washington D.C. in May 2004. He cancelled his personal hearing and has not requested that it be rescheduled.

FINDINGS OF FACT

1. All information and evidence necessary for an equitable disposition of the appeal have been obtained.

2. The veteran's only service connected disability is schizophrenia, evaluated as 100 percent disabling.

3. The service-connected schizophrenia is not shown to have rendered the veteran so helpless as to be unable to care for himself, protect himself from the hazards incident to his environment or attend to the needs of nature; nor does it prevent him from leaving his home.

Appendix F

CONCLUSION OF LAW

The criteria for an award of special monthly compensation based on the need for regular aid and attendance of another person or upon housebound status have not been met. 38 U.S.C.A. §§ 1114(1), (s) (West Supp. 2002); 38 C.F.R. §§ 3.350, 3.351 (2003).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

1. Factual Background

The veteran's service medical records indicate that he was diagnosed with schizophrenic reaction of the paranoid type in service. He was subsequently discharged. Service connection has been in effect for schizophrenia since June 1952.

An evaluation of 100 percent for the veteran's schizophrenia has been in effect since January 1992. While the veteran has numerous other medical disabilities, none are service connected.

The private hospital records dated in November 1999 and December 2000 show treatment for seizures.

The veteran submitted a claim for SMC in August 2001. A September 2001 statement from the veteran's wife indicates that the veteran had difficulty with his balance and he had been falling. She stated that the veteran had suffered from seizures.

Appendix F

In a September 2001 medical statement, a private physician indicated that the veteran could not leave home without the assistance of another person. He also indicated that the veteran could not feed himself, bathe, perform toilet functions or dress without assistance.

In October 2001 the veteran indicated that his VA physician had changed his medications. He noted that he had home care three tunes per week.

The private psychiatric records reflect that the veteran was seen every three months. A September 2001 treatment note states that the veteran was doing well.

A VA aid and attendance examination was conducted in April 2002. The examiner noted that the veteran was service connected for schizophrenia with a 100 percent disability evaluation. The veteran reported that, although his driver's license had been suspended due to his seizures, it had been restored and that he did occasionally drive. He stated that he was not entirely restricted to his home as a daily environment.

The veteran arrived at his examination in a wheelchair and had a cane. He was able to lift himself from the wheelchair and walk with his cane. He complained of urinary urgency, but not incontinence. He was able to dress. The veteran's wife noted that she cooked daily, attended his appointments, ensured that he took his medication, and helped the veteran to dress.

Appendix F

The examiner concluded that the veteran did not require constant supervision or attendance, but indicated that for the veteran's safety, it would be better to be attended in the event of seizures or difficulty with his balance.

An August 2002 medical statement from a private physician indicates that the veteran was wheelchair bound with very limited mobility and was unable to walk or leave the home without the assistance of another person. The physician noted that the veteran could feed himself and attend to his toilet functions, but could not bathe or dress without assistance.

An additional August 2002 medical statement indicates that the veteran could walk 20 feet without assistance. It notes that the veteran could not leave his home, bathe, perform toilet functions or dress without assistance. The veteran was noted to require a wheelchair and walker.

The veteran was hospitalized at a VA facility from September to October 2002, for detoxification therapy and psychiatric care. On admission, the veteran's wife reported that he had suffered a change in mental status. She also indicated that the veteran had been unsteady on his feet with a history of repeated falls and incontinent of urine for more than one year. She reported that he had been drinking in the previous month after a 15-year period of sobriety.

On admission, the veteran was alert, attentive and cooperative. He was cooperative and appropriate in his

behavior. The discharge summary indicates that the veteran attended to his activities of daily living. He was found to be competent for VA purposes, but unemployable due to his service-connected schizophrenia.

In a November 2002 statement, the veteran's wife noted that he was totally dependent on her for his care. She indicated that his disabilities included swollen feet, sleep disorder, drowsiness and dizziness. She stated that he was unable to dress himself and was often unable to control his bladder function. She noted that a home health care aid visited two days per week.

A November 2002 letter from a private physical therapist assistant notes that the veteran underwent physical therapy on a contract basis from July to August 2002. He indicated that the veteran was at high risk for falling and that adaptive equipment had been provided to decrease his risk of fall injury. He opined that the veteran required motorized equipment to maintain an independent lifestyle due to abnormalities of lower extremity function and decreased balance.

A December 2002 letter from a private physician indicates that the veteran was receiving treatment for voiding problems.

A December 2002 letter from the veteran's VA physician notes that the veteran was treated at the primary care clinic for essential hypertension, seizures, back pain, post-traumatic stress disorder, schizophrenia and a

cognitive disorder. He related that the veteran's medical condition was stable and that his mobility was limited due to chronic low back pain and lower leg swelling. He noted that with medication and close medical supervision, the veteran's mental status was less likely to decompensate.

The veteran's wife submitted a written statement in January 2003. She noted that the veteran had difficulty walking and required a wheelchair and walker. She stated that he suffered from swelling of the feet and legs and frequently became very depressed. She noted that the veteran could not get into bed alone and required assistance with dressing and walking. She indicated that the veteran was drowsy and often fell.

A VA examination was carried out in May 2003. The examiner noted that the veteran was able to partially dress himself and to feed himself. He was noted to require help in getting out of bed and getting in and out of the tub, and putting on his shoes and socks. The veteran was reported to do no chores around the house.

The veteran's wife indicated that a home health aide visited three times per week. The veteran stated that he could walk across a room using a cane, but his wife indicated that he fell often. She reported that the veteran often got restless in bed and rolled out while asleep. The veteran stated that he had a scooter which allowed him to get out into the yard.

Appendix F

The examiner noted that the veteran was driven to the examination in a VA vehicle. He indicated that the veteran was not hospitalized or bedridden. He referred to a VA eye examination which reported visual acuities of 20/30 for the right eye and 20/30 for the left. Diagnoses were those of schizophrenia, hypertension and degenerative joint disease of the spine, knees and hips.

A VA mental disorders examination was also conducted in May 2003. The veteran's history was reviewed. He denied current problems with drugs or alcohol. Mental status examination revealed a somewhat disheveled appearance.

The veteran was accompanied by his wife and sat in a wheelchair. Here were no loose associations or flight of ideas. He was calm and his affect was appropriate. He denied nightmares, flashbacks, and intrusive thoughts. He endorsed hearing voices once or twice per week. He denied suspicions or ideas of reference. He was oriented. Insight and judgment appeared to be marginal.

The diagnoses were those of paranoid schizophrenia in partial remission and alcohol dependence in remission. The examiner opined that the veteran was capable of managing his own financial affairs.

In August 2003, the veteran's wife requested to be appointed as his fiduciary due to his inability to manage his affairs.

Appendix F

An August 2003 VA treatment note indicates that the veteran's wife called, concerned that her husband could not manage his financial affairs. She stated that the veteran had gone to the bank to cash his monthly check, then spent the money drinking with friends. She reported that the veteran had driven after drinking and had been recently stopped for drinking and driving. She also stated that the veteran had been driving with a gun in the car.

In a rating decision dated in December 2003, the RO found the veteran competent to manage his financial affairs.

In a March 2004 medical statement, the veteran's VA physician indicated that the veteran had diagnoses of hypertension, seizures, prostate cancer, arthritis and schizophrenia. He reported that the veteran was unable to walk and required assistance with bathing and dressing. He noted that the veteran could feed himself. He stated that the veteran's decreased mobility was the condition which prevented self-care. He noted that the decrease in mobility was due to multiple medical problems.

II. Veterans Claims Assistance Act of 2000

Initially, the Board notes that the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000) was signed into law in November 2000 and is codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West. 2002). Regulations implementing

the VCAA are codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326 (2003). The VCAA and the implementing regulations are applicable to the present appeal.

The Act and implementing regulations essentially eliminate the requirement that a claimant submit evidence of a well-grounded claim, and provide that VA will assist a claimant in obtaining evidence necessary to substantiate a claim but is not required to provide assistance to a claimant if there is no reasonable possibility that such assistance would aid in substantiating the claim.

They also require VA to notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.

As part of the notice, VA is to specifically inform the claimant and the claimant's representative, if any, of which portion, if any, of the evidence is to be provided by the claimant and which part, if any, VA will attempt to obtain on behalf of the claimant. Also, VA is required to request that a claimant provide any evidence in his or her possession that pertains to the claim.

In the present case, the veteran's claim for SMC was received in August 2001. The RO responded with a letter dated in September 2001. That correspondence instructed the veteran regarding the evidence necessary to substantiate his claims and requested that he identify evidence supportive of the claims.

Appendix F

A September 2002 letter also informed the veteran of the evidence and information necessary to substantiate his claims. It noted the evidence that had been received and asked the veteran to identify any further evidence. The RO indicated that it would attempt to obtain non-VA records upon receipt of a proper release.

The Board also observes that the veteran was advised, via a June 2003 Statement of the Case and a November 2003 Supplemental Statement of the Case of the information and evidence necessary to substantiate his claims.

In sum, the RO has complied with the notice requirements of the VCAA and the implementing regulations.

In addition, pertinent treatment records have been obtained, and the veteran has been afforded VA examinations. Neither the veteran nor his representative has identified any additional evidence or information which could be obtained to substantiate the claims. The Board is also unaware of any such outstanding evidence or information. Therefore, the Board is also satisfied that the RO has complied with the duty to assist requirements of the VCAA and the implementing regulations.

Appendix F

III. Analysis

An award of special monthly compensation based on housebound status requires either that the veteran have additional service-connected disability or disabilities independently rated at 60 percent, separate and distinct from the 100 percent service-connected disability and involving a different part of the body, or that he be permanently housebound by reason of the service-connected disability or disabilities. A veteran will be considered housebound where the evidence shows that, as a direct result of his service-connected disability or disabilities, he is substantially confined to his dwelling and the immediate premises or, if institutionalized, to the ward or clinical areas, and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his lifetime. 38 U.S.C.A. § 1114(s); 38 C.F.R. § 3.351(i).

An award of special monthly compensation based on the need for regular aid and attendance of another person is warranted if the veteran's service-connected disability renders him so helpless or bedridden that he requires the assistance of another individual to accomplish basic daily functions. 38 U.S.C.A. § 1114(1); 38 C.F.R. §§ 3.350(b). Determination as to the need for aid and attendance must be based on actual requirements of personal assistance from others. In making such determinations, consideration is given to such conditions as: inability of a claimant to dress himself or to keep himself ordinarily clean and presentable; frequent need of adjustment of any special prosthetic

or orthopedic appliance which by reasons of the particular disability cannot be done without aid; inability of the claimant to feed himself through the loss of coordination of upper extremities or through extreme weakness; inability to tend to the wants of nature; or incapacity, physical or mental, that requires care and assistance on a regular basis to protect claimant from the hazards or dangers incident to his daily environment.

"Bedridden" will be a proper basis for the determination and is defined as that condition which, through its essential character, actually requires that the claimant remain in bed. It is not required that all the disabling conditions enumerated above be found to exist before a favorable rating may be made. The particular personal functions that the claimant is unable to perform should be considered in connection with his condition as a whole. It is only necessary that the evidence establishes that the claimant is so helpless as to need regular aid and attendance, not that there be a constant need. 38 C.F.R. § 3.352(a) (2003).

The Board first notes that the veteran's only service-connected disability is schizophrenia, evaluated as 100 percent disabling. In addition, the evidence demonstrates that the service-connected disability has not rendered him housebound or in need of the regular aid and attendance of another person. In this regard, the Board notes that the veteran suffers from a variety of physical ailments, which have created the need for assistance from his wife and a home health care aide.

Appendix F

The private and VA outpatient records, as well as VA examination reports, mostly note the veteran to be fully oriented and to be competent to handle his finances. Although medical records indicate a measure of impairment in daily functioning due to psychiatric symptoms, the medical evidence of record clearly reflects that the veteran's decrease in mobility due to multiple medical problems is the basis for his inability to attend to activities of daily living.

There is no indication that the veteran's service-connected schizophrenia has a significant impact on his ability to attend to his daily needs. In fact, a May 2003 mental disorders examination report indicates that the veteran's schizophrenia was in partial remission.

Moreover, the veteran's VA physician, in a March 2004 statement, indicated that the condition which prevented self care was decreased mobility. Also significant the fact that the RO determined upon review of the evidence in December 2003 that the veteran was competent to manage his financial affairs.

In sum, veteran's schizophrenia, his sole service connected disability, has not created the need for regular aid and attendance. Nor has it rendered him housebound.

Accordingly, the Board concludes that the veteran has not met the criteria for the award of SMC benefits based on a need for regular aid and attendance.

Appendix F

As the preponderance of the evidence is against the veteran's claim for SMC based on the need for the regular aid and attendance of another person or being housebound, the benefit-of-the-doubt rule does not apply, and the claim must be denied. 38 U.S.C.A. § 5107(b); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

ORDER

Special monthly compensation based on the need for the regular aid and attendance of another person or being housebound is denied.

s/ Stephen L. Wilkins
STEPHEN L. WILKINS
Veterans Law Judge,
Board of Veterans' Appeals

OPPOSITION BRIEF

(5)

No. 09-1036

In the Supreme Court of the United States

DAVID L. HENDERSON, PETITIONER

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 38 U.S.C. 7266(a), which establishes a 120-day time limit for filing a notice of appeal in the Court of Appeals for Veterans Claims in order to seek review of a decision of the Board of Veterans' Appeals, is subject to equitable tolling.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 15
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 8
Bowen v. *City of New York*, 476 U.S. 467 (1986) 7, 8
Bowles v. *Russell*, 551 U.S. 205 (2007) 3, 5, 6, 8
Cellular Telecomms. & Internet Ass'n v. *FCC*, 330 F.3d 502 (D.C. Cir. 2003) 10
Diaz v. *Kelly*, 515 F.3d 149 (2d Cir.), cert. denied, 129 U.S. 168 (2008) 11
eBay, Inc. v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006) 12
Florilli Corp. v. *Pena*, 118 F.3d 1212 (8th Cir. 1997) 10
Forshey v. *Principi*, 284 F.3d 1335 (Fed. Cir.), cert. denied, 537 U.S. 823 (2002) 9
Holmes Group, Inc. v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) 12
INS v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) 7
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 5, 7
Joshi v. *Ashcroft*, 389 F.3d 732 (7th Cir. 2004) 9

Cases—Continued: Page

Kirkendall v. *Department of the Army*, 479 F.3d 830 (Fed. Cir.), cert. denied, 552 U.S. 948 (2007) 13
Reed Elsevier, Inc. v. *Muchnick*, 130 S. Ct. 1237 (2010) 10, 11
Shinseki v. *Sanders*, 129 S. Ct. 1696 (2009) ... 2, 5, 9, 11, 12
Stone v. *INS*, 514 U.S. 386 (1995) 10
United States v. *Denedo*, 129 S. Ct. 2213 (2009) 4, 13
United States v. *Dolan*, 571 F.3d 1022 (10th Cir. 2009), cert. granted, No. 09-367 (argued Apr. 20, 2010) 11
United States v. *Henderson*, 536 F.3d 776 (7th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009) 11
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 8

Constitution and statutes:

U.S. Const.:
Art. I 2, 4
§ 8 ..... 4, 13
Art. III 4
Administrative Orders Review Act of 1950, ch. 1189, 64 Stat. 1129 10
17 U.S.C. 411(a) 10
28 U.S.C. 1291 8
28 U.S.C. 2107 8
28 U.S.C. 2344 10
38 U.S.C. 301(c)(5) 2
38 U.S.C. 5100 *et seq.* 2
38 U.S.C. 7101 *et seq.* 2
38 U.S.C. 7252 ..... 2, 9

Statutes—Continued: Page

38 U.S.C. 7252(b) 9
38 U.S.C. 7261(a)(4) 9
38 U.S.C. 7261(b) 9
38 U.S.C. 7261(b)(2) 11
38 U.S.C. 7261(c) 9
38 U.S.C. 7266 ..... 2, 4, 7
38 U.S.C. 7266(a) ..... *passim*
38 U.S.C. 7292 2
38 U.S.C. 7292(d) 9
42 U.S.C. 405(g) 7
42 U.S.C. 2000e-16(c) (1988) 7

Miscellaneous:

S. 3192, 111th Cong., 2d Sess. (2010) 14
Hearing Before the S. Comm. On Veterans' Affairs, 111th Cong. (May 19, 2010), http://veterans.senate.gov/hearings.cfm?action=release.display&release_id=ff37432e-ecdc-4d96-b6db-95481b4d00be, (statement of Thomas J. Pamperin, Assoc. Deputy Under Sec'y for Policy and Program Mgmt., Veterans Benefits Admin.) 14
Letter to Nancy Pelosi, Speaker of the House of Representatives, from Eric K. Shinseki, Secretary of Veterans Affairs (May 26, 2010) 14

In the Supreme Court of the United States

No. 09-1036

DAVID L. HENDERSON, PETITIONER

v.

ERIC K. SHINSEKI,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-73a) is reported at 589 F.3d 1201. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 74a-92a) is reported at 22 Vet. App. 217. The opinion of the Board of Veterans' Appeals (Pet. App. 103a-117a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2009. The petition for a writ of certiorari was filed on February 24, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Veterans who wish to claim benefits must submit an application to the Department of Veterans Affairs (VA). See 38 U.S.C. 5100 *et seq.* The initial decision on a benefits claim is issued by a VA regional office. See *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1701 (2009). A claimant may appeal an adverse decision of the regional office to the Board of Veterans' Appeals (Board), which is a component of the VA. See 38 U.S.C. 301(c)(5), 7101 *et seq.*

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court. See 38 U.S.C. 7252. A statutory provision entitled "[n]otice of appeal," 38 U.S.C. 7266, provides in pertinent part that, "[i]n order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed." 38 U.S.C. 7266(a). Decisions of the Veterans Court may in turn be appealed, subject to certain limitations on the scope of appellate review (see p. 9, *infra*), to the United States Court of Appeals for the Federal Circuit. See 38 U.S.C. 7292.

2. Petitioner is a veteran who applied for—and is currently receiving—100% disability benefits for paranoid schizophrenia connected to his military service. Pet. App. 3a. In August 2001, he applied for supplemental benefits for in-home care. *Ibid.* The regional office denied his claim, and petitioner sought Board review. *Ibid.* In a decision dated August 30, 2004, the Board denied petitioner's appeal. *Ibid.* Petitioner then sought review in the Veterans Court, but he did not file a notice

of appeal until January 12, 2005—15 days after the expiration of the 120-day period prescribed by Section 7266(a). *Ibid.*

3. The Veterans Court dismissed petitioner's appeal as untimely. Pet. App. 98a-102a. The court agreed with petitioner that the 120-day time limit for filing a notice of appeal is subject to equitable tolling "[i]n limited circumstances." *Id.* at 100a. The court concluded, however, that petitioner had failed to establish an entitlement to tolling because he had "not shown how a mental or physical illness caused his [notice of appeal] to be untimely." *Id.* at 102a.

Petitioner sought reconsideration of that ruling. The Veterans Court requested supplemental briefing on whether this Court's decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007), which held that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement, precluded equitable tolling of the deadline for taking an appeal to the Veterans Court. Pet. App. 93a-95a. The Veterans Court ultimately concluded that the deadline in Section 7266(a) is not subject to tolling, and it again dismissed petitioner's appeal. *Id.* at 74a-92a.

4. Petitioner appealed, and the case was argued before a panel of the court of appeals. After argument, but before the case was decided, the court *sua sponte* granted rehearing en banc. The en banc court affirmed the dismissal order of the Veterans Court. Pet. App. 1a-43a.

a. The court of appeals began by noting this Court's holding in *Bowles* that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." Pet. App. 25a (quoting *Bowles*, 551 U.S. at 214). The court construed Section 7266(a) to be "a notice of appeal, or time of review, provision," and it concluded that the 120-day time limit "is jurisdictional" and therefore "not

subject to equitable tolling." *Ibid.* In reaching that conclusion, the court rejected petitioner's argument that Section 7266(a) is more analogous to a statute of limitations than to a time-of-review provision. The court observed that Section 7266 is entitled "Notice of appeal" and that Section 7266(a) refers to the "timely filing of a notice of appeal" "in order to obtain *review*" by the Veterans Court. *Id.* at 26a-27a. The court further noted that the review performed by the Veterans Court is on the agency record and is performed under standards "characteristic[] of appellate review, rather than of an assessment of claims in the first instance." *Id.* at 27a.

The court of appeals next examined the text and legislative history of Section 7266(a), discerning no "clear intent on the part of Congress to override the presumed jurisdictional treatment of time of review provisions." Pet. App. 29a. Nor, in the court's view, could *Bowles* persuasively be distinguished on the ground that it involved an appeal to an Article III court rather than to the Article I Veterans Court. *Id.* at 36a-37a. To the contrary, the court noted that jurisdictional limitations apply with "*added* force to Article I tribunals, . . . which owe their existence to Congress' authority to enact legislation pursuant to [Article I, Section 8] of the Constitution." *Id.* at 37a (quoting *United States* v. *Denedo*, 129 S. Ct. 2213, 2221 (2009)). Finally, the court of appeals rejected the contention of petitioner and his amici that the general pro-claimant orientation of the veterans benefit system alters the jurisdictional character of Section 7266(a). *Id.* at 40a-41a. The court explained that "although 'Congress has expressed special solicitude for the veterans' cause,' we do not have free rein to establish special procedural schemes governing

the veterans' system alone." *Id.* at 41a (quoting *Sanders*, 129 S. Ct. at 1707).

b. Judge Dyk concurred, joined by Judges Gajarsa and Moore. Pet. App. 44a-45a. While joining the opinion of the court, the concurring judges expressed the view that "the rigid deadline of the existing statute can and does lead to unfairness," *id.* at 44a, and they suggested "that Congress should amend the statute to provide a good cause exception," *id.* at 45a.

c. Judge Mayer dissented, joined by Judges Michel and Newman. Pet. App. 46a-73a. The dissenting judges characterized Section 7266(a) "as a statute of limitations rather than a rigid jurisdictional bar," *id.* at 53a, and they viewed this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), as establishing a presumption of equitable tolling that was undisturbed by *Bowles*. Pet. App. 47a-48a. The dissenting judges also concluded that the court of appeals had failed to give adequate weight to what they described as the "uniquely pro-claimant adjudicatory scheme" that governs veterans benefits determinations. *Id.* at 66a.

ARGUMENT

This Court's decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007), reaffirmed the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 210. Strict enforcement of such time limits will undoubtedly produce painful results in particular cases. It is ultimately up to Congress, however, to strike what it views as the appropriate balance between the protection of deserving litigants' access to appellate review, on the one hand, and countervailing systemic interests in finality and efficient administration on the other. In striking that balance in the specific context of

veterans-benefit appeals, Congress may, for weighty reasons, take account of the fact that such appeals involve individuals to whom our Nation owes a great debt.

In this case, the court of appeals correctly held that 38 U.S.C. 7266(a), which prescribes the time limit for filing a notice of appeal in the Veterans Court to obtain review of a VA benefits determination, is jurisdictional and not subject to equitable tolling. That decision does not conflict with any decision of this Court or any other court of appeals. To the contrary, it accords with the general principles governing statutory time limits that this Court discussed in *Bowles*. Moreover, Congress has before it two legislative proposals—one of which the Executive Branch supports—that would permit the Veterans Court to extend the time for appeal upon a showing of good cause. If enacted, such legislation would greatly limit the prospective significance of the decision below. Further review is not warranted.

1. The court of appeals correctly held that the time limit prescribed in Section 7266(a) is a limitation on the jurisdiction of the Veterans Court. In *Bowles*, this Court reaffirmed the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210. Section 7266(a) is just such a time limit: it provides that, "[i]n order to obtain review" in the Veterans Court of a decision of the Board, a person aggrieved by the decision "shall file a notice of appeal with the Court within 120 days." Under *Bowles*, petitioner's failure to comply with that deadline precluded the Veterans Court from exercising jurisdiction over his appeal.

Petitioner contends (Pet. 19-22) that Section 7266(a) is a statute of limitations rather than a rule governing the time limits for taking an appeal, and that *Bowles* is therefore inapposite. Petitioner argues (Pet. 22-26) that

the deadline imposed by Section 7266(a) is instead subject to the principles of equitable tolling recognized in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Bowen* v. *City of New York*, 476 U.S. 467 (1986). That argument is contrary to both the plain language of Section 7266(a) and the overall structure of the system for judicial review of veterans benefits claims.

a. Petitioner's theory rests on the premise that "Section 7266(a) establishes the time limit for a veteran to commence a civil action against the Secretary." Pet. 19 (emphasis omitted). The text of Section 7266(a) makes clear, however, that the provision establishes a notice-of-appeal deadline, not a statute of limitations for the "commence[ment]" of an action. The statutory deadline expressly pertains to the filing of a "notice of appeal." See 38 U.S.C. 7266(a) (stating that, "[i]n order to obtain review" in the Veterans Court of a Board decision, a veteran "adversely affected" by the decision "shall file a notice of appeal with the Court within 120 days"). And the title of Section 7266 is "Notice of appeal." See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

The language of Section 7266(a) is significantly different from the wording of the provisions at issue in *Irwin* and *Bowen*. The Court in *Irwin* construed 42 U.S.C. 2000e-16(c) (1988), which permitted a federal employee to "file a civil action" based on a discrimination complaint "[w]ithin thirty days of receipt of notice of final action" by the Equal Employment Opportunity Commission. See 498 U.S. at 94-95. And the Court in *Bowen* construed 42 U.S.C. 405(g), which provides that an individual aggrieved by an administrative decision

concerning Social Security benefits "may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision." See 476 U.S. at 478; *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). In both cases, the Court held that the relevant provisions were statutes of limitations that were subject to equitable tolling. Unlike those statutes, however, Section 7266(a) does not refer to the "fil[ing]" or "commence[ment]" of a new civil action, but to the filing of a notice of appeal in an existing case. Because Section 7266(a) is a statutory deadline for taking appeals, *Bowles* indicates that it is jurisdictional in nature.

Petitioner notes (Pet. 20) that Section 7266(a) does not expressly refer to the "jurisdiction or power of the Veterans Court," and he points out (Pet. 20-21) that Section 7266(a) is separate from the provision creating the Veterans Court and defining its jurisdiction. But the provision at issue in *Bowles* (28 U.S.C. 2107) likewise does not use the word "jurisdiction," and it does not appear in the same chapter of Title 28 as 28 U.S.C. 1291, the section granting courts of appeals authority to review final judgments of district courts. Nevertheless, "[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003); see *Bowles*, 551 U.S. at 210.

b. The structure of the veterans judicial review system reinforces the conclusion that the role of the Veterans Court is not analogous to that of the district court under the statutory schemes at issue in *Irwin* or *Bowen*. The Veterans Court operates as an appeals court. Its sole statutory responsibility is to review the final decisions of a body—the Board of Veterans' Appeals—that

itself performs an adjudicative function. See 38 U.S.C. 7252. The Veterans Court cannot review findings of fact de novo but instead applies the typical appellate standard of clear error. 38 U.S.C. 7261(a)(4) and (c). It also must take account of the rule of prejudicial error, 38 U.S.C. 7261(b); see *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1700, 1704-1706 (2009), and it must perform its review exclusively on the record before the VA, 38 U.S.C. 7252(b).

Indeed, for certain aspects of a veteran's claim, the *only* available judicial appellate review is performed by the Veterans Court, since the Federal Circuit's jurisdiction is generally limited to reviewing questions of law. Except in constitutional cases, the Federal Circuit cannot review factual findings, even for clear error, and cannot review the application of law to fact. 38 U.S.C. 7292(d); *Forshey* v. *Principi*, 284 F.3d 1335, 1345-1347, 1351 (Fed. Cir.) (en banc), cert. denied, 537 U.S. 823 (2002). Those aspects of typical appellate review are performed only by the Veterans Court.

Thus, Section 7266(a) establishes a deadline for seeking *appellate* review of a final agency decision regarding veterans benefits. The Veterans Court is an appellate body exercising an appellate function, and a proceeding in that court is a civil appeal rather than a *de novo* civil action. Cf. *Joshi* v. *Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2004) (observing, before *Bowles*, that "[t]he emergent distinction, so far as classification of deadlines as jurisdictional or not jurisdictional is concerned, is between those deadlines that govern the transition from one court (or other tribunal) to another, which are jurisdictional, and other deadlines, which are not.").

Petitioner points out (Pet. 28) that the appeal to the Veterans Court is the first time a case appears in a

court. That fact, however, does not control the jurisdictional analysis. In *Stone* v. *INS*, 514 U.S. 386 (1995), this Court held that the deadline for filing a petition for review of a decision of the Board of Immigration Appeals is jurisdictional, even though a petition for review provides the first opportunity to have a removal order considered by a court. See *id.* at 406. And in other cases governed by the Administrative Orders Review Act of 1950 (Hobbs Act), ch. 1189, 64 Stat. 1129, the courts of appeals have uniformly held that the 60-day time limit on petitions for review of agency orders is jurisdictional and may not be waived even by consent of the parties. See 28 U.S.C. 2344; *Cellular Telecomms. & Internet Ass'n* v. *FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003); *Florilli Corp.* v. *Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997). In sum, neither the language of Section 7266(a) nor the nature of the review conducted by the Veterans Court provides any sound basis for distinguishing this case from *Bowles*.

c. Contrary to the suggestion of petitioner's amici, the Court's recent decision in *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010), does not cast doubt on the court of appeals' disposition of this case. See Paralyzed Veterans of America Br. 4-6; National Org. of Veterans' Advocates, et al. Br. 10-12. In *Reed Elsevier*, the Court held that the statutory requirement to register a copyright before suing for infringement is a claim-processing rule, not a jurisdictional prerequisite. 130 S. Ct. at 1241; see 17 U.S.C. 411(a). In reaching that conclusion, the Court emphasized that the determination whether a particular provision is jurisdictional turns not on the presence or absence of "a 'jurisdictional' label," but instead on "whether the type of limitation that [a statute] imposes is one that is properly ranked as juris-

dictional absent an express designation." 130 S. Ct. at 1248. And the Court reiterated that the "type[s] of limitation" at issue in *Bowles*—"statutory deadlines for filing appeals"—are properly regarded as jurisdictional. *Ibid.* Unlike the statute at issue in *Reed Elsevier*, Section 7266(a) falls squarely within that category.*

2. Petitioner identifies (Pet. 27-31) various ways in which the VA adjudication system differs from other administrative adjudication systems. Those observations, however, provide no basis for deviating from the general rule that statutory deadlines for the taking of appeals are jurisdictional. Last Term, this Court rejected the specialized framework devised by the Federal Circuit for resolving harmless-error questions in appeals to the Veterans Court. *Sanders*, 129 S. Ct. at 1700, 1704-1706. This Court held that the statutory command to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2), directed the Veterans Court "to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." 129 S. Ct. at 1704. The

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* Amici National Organization of Veterans' Advocates, et al., also argue (Br. 13) that the decision below is at odds with the decisions of other circuits that have applied equitable tolling after this Court's decision in *Bowles*. Two of the three cases those amici cite, however, did not involve appeal periods at all. See *United States* v. *Dolan*, 571 F.3d 1022, 1025-1031 (10th Cir. 2009) (deadline for district court to impose restitution in a criminal case), cert. granted, No. 09-367 (argued Apr. 20, 2010); *Diaz* v. *Kelly*, 515 F.3d 149, 153-154 (2d Cir.) (statute of limitations for filing habeas petition), cert. denied, 129 U.S. 168 (2008). The third case did not involve an appeal filed after a statutory deadline had passed, and the decision held only that the appeal period did not start to run until after the district court denied a motion for reconsideration. See *United States* v. *Henderson*, 536 F.3d 776, 778-779 (7th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009). Those decisions are therefore inapposite here.

Court therefore "assess[ed] the lawfulness of the Federal Circuit's approach in light of [the Court's] general case law governing application of the harmless-error standard." *Ibid.* In other cases as well, this Court has disapproved the Federal Circuit's creation of special rules applicable to cases within its specialized subject-matter jurisdiction, and it has directed that court of appeals to apply rules of general applicability consistent with the precedents of this Court and the regional circuits. See *eBay, Inc.*, v. *MercExchange, L.L.C.*, 547 U.S. 388, 391-394 (2006); *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832-834 (2002).

In this case, the court of appeals appropriately took account of *Sanders* in reconsidering its pre-*Bowles* decisions permitting equitable tolling of statutory appeal periods. See Pet. App. 41a ("[W]e have recently been reminded by the Supreme Court that, although 'Congress has expressed special solicitude for the veterans' cause,' we do not have free rein to establish special procedural schemes governing the veterans' system alone.") (quoting *Sanders*, 129 S. Ct. at 1707). While recognizing that "the veterans' system is unique," the court was properly "wary of hinging different procedural frameworks solely on the special nature of that system." *Id.* at 42a. The court explained that "[j]urisdiction is in the province of Congress, and without any clear intent by Congress to provide for equitable relief from the Notice of Appeal filing deadline in 38 U.S.C. 7266(a), we cannot read in such relief based on the nature of the veterans system." *Ibid.* The court correctly recognized that it is up to "Congress to determine the subject-matter jurisdiction of federal courts," and that this "rule applies with *added* force to Article I tribunals" such as the Veterans Court, "which owe their existence to Congress'

authority to enact legislation pursuant to [Article I, Section 8] of the Constitution." *Id.* at 37a (quoting *United States* v. *Denedo*, 129 S. Ct. 2213, 2221 (2009)).

3. Petitioner suggests (Pet. 16-17) that review is warranted in this case because the Government petitioned for a writ of certiorari in *Kirkendall* v. *Department of the Army*, 479 F.3d 830 (Fed. Cir.) (en banc), cert. denied, 552 U.S. 948 (2007). But this Court *denied* the petition in *Kirkendall*, so that case hardly establishes that the Court should grant the petition here. In any event, the administrative proceedings before the Merit Systems Protection Board in *Kirkendall* were significantly different from the judicial proceeding to which Section 7266(a) applies. See *id.* at 834-835. This case, like *Bowles*, involves an untimely appeal filed to an appellate court. *Kirkendall* did not involve a court or a judicial proceeding at all; it concerned the appeal of a decision of the Secretary of Labor to another administrative body. The question whether equitable tolling is available in that context is distinct from the issue presented here.

4. As petitioner correctly explains (Pet. 13-16), the decision below creates some potential for unfair results in cases where circumstances beyond a veteran's control prevent him from filing a timely notice of appeal. In his concurring opinion, Judge Dyk called upon Congress to "amend the statute to provide a good cause exception." Pet. App. 45a. With the support of the Executive Branch, Congress is currently considering whether to enact such an amendment.

One bill already introduced in response to the decision below would allow veterans to reinstate appeals that were dismissed by the Veterans Court on or after July 24, 2008—the date on which petitioner's appeal was

dismissed—"upon a showing that the petitioner had good cause for filing the petition on the date it was filed." S. 3192, 111th Cong., 2d Sess. § 2(b) (2010). If enacted, that bill would overturn the decision below as it applies to petitioner's appeal and all subsequent appeals, and it would therefore moot this case.

The VA has expressed opposition to S. 3192 because it contains no limit on the length of time for which the appeal period can be extended. See *Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. (May 19, 2010), http://veterans.senate.gov/hearings.cfm?action=release.display&release_id=ff37432e-ecdc-4d96-b6db-95481b4d00be (Statement of Thomas J. Pamperin, Associate Deputy Under Sec'y for Policy and Program Mgmt., Veterans Benefits Admin.). The VA has instead proposed that Congress amend Section 7266(a) to permit the Veterans Court, upon a showing of good cause, to extend the notice-of-appeal period for up to 120 days after the expiration of the original period. See Letter to Nancy Pelosi, Speaker of the House of Representatives, from Eric K. Shinseki, Secretary of Veterans Affairs (May 26, 2010) (transmitting the VA's proposed "Veterans Benefit Programs Improvement Act of 2010," including Section 209, "Good cause extension of the period for filing a notice of appeal with the Court of Appeals for Veterans Claims") (App., *infra*, 1a-6a). The VA's proposal would apply only to cases that are still pending before the Board or in which the 120-day period for seeking an extension has not yet expired, and it therefore would not alter the result in this case.

Congress thus has before it two proposals for statutory amendments that would soften the effect of Section 7266(a)'s 120-day filing deadline. The potential for a legislative resolution of the question presented is a fur-

ther reason that the Court's intervention is unnecessary at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

APPENDIX

THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON

May 26, 2010

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Dear Madam Speaker:

I am transmitting a draft bill, the "Veterans Benefit Programs Improvement Act of 2010." I request that this draft bill be referred to the appropriate committee for prompt consideration and enactment. The draft bill would make beneficial changes to enhance the efficiency and fairness of several Department of Veterans Affairs (VA) programs of benefits to Veterans and their families and to improve the procedures for the timely adjudication of claims and appeals for such benefits.

Title I of the draft bill would improve VA's compensation and pension programs by, among other things, eliminating a disparity arising under a judicial decision concerning payment of special monthly pension to disabled Veterans and by clarifying and simplifying the law governing month-of-death payments to surviving spouses. Title I of the draft bill would also improve VA's process for establishing presumptions of service connection for diseases associated with exposure to herbicides or hazards of Gulf War service in two ways. First, it would ensure that VA has sufficient time to give thorough consideration to the complex issues involved in such determinations. Second, it would provide that the effective

dates of awards based on a new presumption may be made commensurate with the date of the Secretary's determination that the presumption is needed rather than the date of final regulatory action. Title I would also extend existing authorities pertaining to contract compensation and pension examinations and pension payments to beneficiaries receiving Medicaid-covered nursing home care.

Title II of the draft bill would implement changes to improve the timeliness and efficiency of VA's adjudication of claims and appeals. In response to recent judicial decisions, the draft bill would reaffirm VA's authority to temporarily stay adjudications when necessary to avoid waste or delay, such as where a pending judicial precedent may significantly alter governing law in a way that would otherwise necessitate widespread remands of claims previously decided. The provisions in title II of the bill would also promote greater efficiency in appeals processing by providing for increased use of videoconferencing technology to conduct hearings before the Board of Veterans' Appeals (Board), by allowing the Board to consider in the first instance additional evidence submitted on appeal, and by modifying procedures relating to the timely filing of notices of disagreement and substantive appeals. Other provisions in titles II and VI of the draft bill would promote efficient administration of benefits by extending existing authorities for conducting data matching with other Federal entities and for maintaining a regional office in the Republic of the Philippines.

Improvements to VA's loan guaranty program under title III of the draft bill include a provision to ensure that a single-parent Veteran who returns to active duty may obtain a VA-guaranteed home loan if the Veteran's child occupies the home. The draft bill would also authorize the Secretary to allow superior liens created by public entities providing assistance in response to a major disaster, such as Hurricane Katrina, to ensure that Veterans may obtain such disaster relief, which may reduce the likelihood of foreclosures and claims against VA's loan guaranty.

Title IV of the draft bill would revise provisions relating to vocational rehabilitation and education benefits to increase the utility of incentives for employers to provide on-the-job training to veterans with service-connected disabilities, to promote greater efficiency in the approval of educational programs, and to permit extension of the delimiting date for education benefits for a beneficiary serving as the primary caregiver of a seriously injured Veteran.

The provisions of title V of the draft bill would provide Veterans Group Life Insurance participants who are insured for less than the maximum amount the opportunity to purchase additional coverage and would make permanent the current authority to extend Servicemembers' Group Life Insurance coverage for 2 years to Veterans who are totally disabled when they leave service.

Enclosed is a detailed section-by-section analysis of the provisions of this draft bill.

The Office of Management and Budget's preliminary estimate indicates that the bill would on net reduce direct spending by $1.23 billion over Fiscal Years (FY)

2010-2015 and $1.65 billion over FYs 2010-2020. The Statutory Pay-As-You-Go (PAYGO) Act of 2010 provides that revenue and direct spending legislation cannot, in the aggregate, increase the on-budget deficit. If such legislation increases the on-budget deficit and that increase is not offset by the end of the Congressional session, a sequestration must be ordered. This proposal would reduce direct spending and is therefore in compliance with the Statutory PAYGO Act.

The Office of Management and Budget advises that the transmittal of this draft bill is "in accord" with the President's program.

Sincerely,

/s/ ERIC K. SHINSEKI
ERIC K. SHINSEKI

Enclosure

111th Congress
2nd Session

A BILL

To amend title 38, United States Code, to improve and enhance the programs of compensation, pension, loan guaranty, education and vocational rehabilitation, and insurance for veterans, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Veterans Benefit Programs Improvement Act of 2010."

* * * * *

SEC. 209. GOOD CAUSE EXTENSION OF THE PERIOD FOR FILING A NOTICE OF APPEAL WITH THE COURT OF APPEALS FOR VETERANS CLAIMS.

(a) IN GENERAL.—Section 7266 of title 38, United States Code, is amended—

(1) in subsection (d), by striking "subsection (c)(2)" and inserting "subsection (d)(2)";

(2) by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively; and

(3) by inserting after subsection (a) the following new subsection (b):

"(b) The Court may, upon motion filed with the Court not later than 120 days after expiration of the original 120-day appeal period prescribed under subsection (a), extend the time to file a notice of appeal for a period not to exceed 120 days from the expiration of the original 120-day appeal period upon a showing of good cause. If a motion for extension is filed after expiration of the original 120-day appeal period, the notice of appeal must be filed concurrent with or prior to the filing of the motion. The Court's decision on the motion for extension or any issue concerning the motion shall be final and not subject to review by any other Court."

(b) EFFECTIVE AND APPLICABILITY DATES.—

(1) The amendments made by subsection (a) shall take effect on the date of the enactment of this Act.

(2) The amendments made by subsection (a) shall apply with respect to cases in which a final decision by the Board of Veterans' Appeals is issued on or after the date of the enactment of this Act and to any other cases in which the 120-day period for filing a motion for extension following the original 120-day appeal period has not expired on the date of the enactment of this Act.

REPLY BRIEF

Supreme Court, U.S.
JUN 3 - 2010

No. 09-1036

IN THE

Supreme Court of the United States

DAVID L. HENDERSON,

Petitioner,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
A. This Court's Review Is Urgently Needed	2
1. The question presented is critically important to the Nation's veterans	2
2. The minuscule chance that Congress will act is not a basis to deny review	4
3. This Court should correct the Federal Circuit's erroneous interpretation of *Bowles*	7
B. The Lower Court Decision is Wrong	9
1. Section 7266(a) is a statute of limitations	9
2. An "appeal" of agency action under Section 7266 does not render the 120-day time limit jurisdictional	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases

Boone v. Lightner, 319 U.S. 561 (1943) 2

Bowen v. New York, 476 U.S. 467 (1986) 10, 11

Bowles v. Russell, 551 U.S. 205 (2007) 1, 7, 8, 11

Brown v. Gardner, 513 U.S. 115 (1994) 12

Enocencio v. Shinseki, No. 08-1957, 2009 WL 4927985 (Vet. App. Dec. 22, 2009) 12

Heckler v. Day, 467 U.S. 104 (1984) 12

Irwin v. Department of Veterans' Affairs, 498 U.S. 89 (1990) 11

Kirkendall v. Department of the Army, 479 F.3d 830 (Fed. Cir.), *cert. denied*, 552 U.S. 948 (2007) 8

Lawrence v. Chater, 516 U.S. 163 (1996) 7

Percy v. Shinseki, 23 Vet. App. 37 (2009) 12

Posey v. Shinseki, 23 Vet. App. 406 (2010) 4

Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010) 7, 11

Authorities

Page

Sims v. Apfel, 528 U.S. 1018 (1999) 6, 11

Stone v. INS, 514 U.S. 386 (1995) 12

Statutes

38 U.S.C. § 7266 ..... *passim*

38 U.S.C. § 7292 7

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Other Materials

Dan Balz & Chris Cillizza, *Sen. Arlen Specter Loses Pennsylvania Primary*, Wash. Post, May 19, 2010 5

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U.S. Pet. Reply, *Gonzales v. Duenas-Alvarez*, No. 05-1629, 2006 WL 2581844 5

U.S. Pet. Reply, *Gonzales v. Penuliar*, No. 05-1630, 2006 WL 2590487 5

Authorities

Page

U.S. Opp., *Sims v. Apfel*, No. 98-9537 6

U.S. Pet., *United States v. Clintwood Elkhorn Mining Co.*, No. 07-308, 2007 WL 2608817 .. 5

U.S. Pet., *United States v. Eurodif, S.A.*, No. 07-1059, 2008 WL 437010 4

U.S. Pet. Reply, *United States v. Eurodif, S.A.*, No. 07-1059, 2008 WL 905193 ..... 1, 4, 5

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INTRODUCTION

The question whether equitable tolling applies to the time limit for veterans to seek judicial review of a VA denial of disability benefits is of immense and recurring importance to the 23 million veterans and their families who have made enormous sacrifices while serving this Nation. *Hundreds* of cases already have been dismissed based on the court of appeals' erroneous view that *Bowles v. Russell*, 551 U.S. 205 (2007), imposes a jurisdictional time bar to a veteran's *first request* for judicial review.

The government does not contest the importance of the question presented and acknowledges that the decision below imposes "painful" and "unfair" results based on "circumstances beyond a veteran's control." Opp. 5, 13. But unless this Court intervenes or Congress acts, the government's position consigns thousands of wounded veterans to a regime that deprives them of essential financial resources and critical medical care.

The government argues that Congress has before it two proposals that would "soften the effect" of the decision below. Opp. 14. But "the possibility that the legislative branch might fix problems caused by the Federal Circuit's misinterpretation of [a federal] statute provides no reason for this Court to deny review." U.S. Pet. Reply, *United States v. Eurodif, S.A.*, No. 07-1059, at 8, 2008 WL 905193. The government points to a bill sponsored by Senator Specter, which the government *opposes*, and to draft legislation that would apply only prospectively and would be of no benefit to petitioner or any of the hundreds of other veterans whose cases have been dismissed based on this case.

The Nation's wounded veterans and their families deserve better than to be left hanging on a mere thread of speculative hope that Congress may someday step in to correct the erroneous decision below. The Federal Circuit's decision imposes a grave injustice on veterans "who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone v. Lightner*, 319 U.S. 561, 575 (1943), and is wrong on the merits. This Court's review is warranted.

ARGUMENT

A. This Court's Review Is Urgently Needed

1. *The question presented is critically important to the Nation's veterans*

The decision below affects a massive nationwide program providing benefits to millions of disabled veterans. The government does not dispute that:

- Millions of veterans have disability claims pending with the VA. Pet. 14.
- Most veterans seeking benefits are unrepresented by counsel. *Id.*
- Veterans prevail in 80% of the Veterans Court cases decided on the merits. *Id.* In over half of those cases, the veteran is awarded attorney fees because the government's position was not substantially justified. *Id.* 15.

- *Hundreds* of veterans' cases already have been dismissed as a result of this case. *Id.* 15-16. Indeed, in the short period since the petition was filed, more than 60 additional cases have been dismissed based on the decision below.

The decision below requires the dismissal of *meritorious* claims. Unless this Court intervenes, the rule will continue to govern the rights of millions of current and future veterans seeking disability benefits from the VA.

The government acknowledges that many "circumstances beyond a veteran's control prevent him from filing a timely notice of appeal." Opp. 13. Indeed, as in this case, those circumstances include serious medical disabilities, including the very service-connected disabilities for which the veteran seeks benefits.[1] Other circumstances involve the VA's misconduct in mishandling a veteran's claim, in providing erroneous advice to the veteran, or both.[2]

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[1] *See, e.g.*, Veterans Court Nos. 10-0438, 09-4743, 09-3686, 09-3271, 09-1417, 09-1158, 09-0934, 08-3385, 08-3322, 08-2689, 08-2489, 08-2341, 08-0904, 08-0631, 07-2214, 07-1041, 07-1175, 07-0782, 06-2861, 06-2574, 03-1996, 02-2382. The government observes that a single-judge order concluded that petitioner had not shown that his 15-day delay resulted from his mental illness. Opp. 3. The government, however, fails to mention that a panel of the Veterans Court revoked that order. Pet. 6-7.

[2] *See, e.g.*, Veterans Court Nos. 09-4669, 09-3554, 09-3242, 09-3182, 09-2493, 09-2042, 09-0567, 08-3507, 08-3406, 08-2984, (Cont'd)

The loss of even one veteran's meritorious claim is a tragedy. Considering the rapid and continuous flow of cases being dismissed—and that, on average, 80% of those claimants would have prevailed in the Veterans Court—this Court's review is urgently needed.

2. *The minuscule chance that Congress will act is not a basis to deny review*

The government observes that two legislative "proposals" are before Congress that would "soften the effect of Section 7266(a)'s 120-day filing deadline." Opp. 14. The government, however, recently advised this Court that proposed legislation was *not* a reason to deny review of a Federal Circuit decision: "In cases involving statutory interpretation, Congress could *always* solve the problem by legislation." U.S. Pet. Reply, *United States v. Eurodif, S.A.*, No. 07-1059, at 8, 2008 WL 905193 (emphasis in original). "The speculative possibility that Congress might ultimately enact one of the bills . . . should not deter the Court from considering the important questions presented by this case." *Id.*[3]

(Cont'd)

08-2854, 08-2511, 08-1468, 08-1381, 08-1202, 08-0788, 08-0342, 08-0228, 07-3070, 07-2548, 07-1923, 07-0653, 06-952, 06-3271, 06-3170, 06-2800, 06-0820; *see also, e.g.*, *Posey v. Shinseki*, 23 Vet. App. 406, 411-15 (2010) (Hagel, J., concurring) (criticizing VA's conduct).

[3] *Accord, e.g.*, U.S. Pet., *United States v. Eurodif, S.A.*, No. 07-1059, at 26 n.4, 2008 WL 437010 ("[B]ills are currently pending in committees in Congress. . . . There is no guarantee, however, that the legislation will be enacted, much less that it

(Cont'd)

The odds are exceedingly low that either proposal will ever become law, much less in their current form. Senator Arlen Specter introduced S. 3192 with no co-sponsor, and Senator Specter recently lost his primary election. Dan Balz & Chris Cillizza, *Sen. Arlen Specter Loses Pennsylvania Primary*, Wash. Post, May 19, 2010. Even bills that have a sponsor in office have about a 4% chance of being enacted. *See, e.g.*, U.S. Senate, *Final Resume of Congressional Activity, First and Second Sessions of the 110th Congress*, www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm. And the odds of passage plummet even further where, as here, the executive branch has expressly opposed the bill. Opp. 14 ("The VA has expressed opposition to S. 3192.").[4]

The government also relies on a proposed bill that the VA sent to Congressional leaders two days before the government filed its response in this Court. Opp. App. 1a. That proposal is even less likely to become law.

(Cont'd)

will be enacted in its present form."); U.S. Pet., *United States v. Clintwood Elkhorn Mining Co.*, No. 07-308, at 26 n.7, 2007 WL 2608817 ("[B]ills are currently pending in committees in Congress that, if passed, could resolve the question presented.... This Court's review is nonetheless warranted."); U.S. Pet. Reply, *Gonzales v. Duenas-Alvarez*, No. 05-1629, at 10 n.8, 2006 WL 2581844 ("[I]t remains uncertain whether legislation addressing the question presented in this case will be passed.... [T]herefore, the pendency of those bills provides no basis for denying certiorari."); U.S. Pet. Reply, *Gonzales v. Penuliar*, No. 05-1630, at 8 n.5, 2006 WL 2590487 ("[T]he pendency of the bills provides no basis for denying certiorari.").

[4] The only action on S. 3192 was a hearing during which the VA opposed the bill. *See* http://thomas.loc.gov; Opp. 14.

It has no sponsor, is before no committee, and includes numerous *anti-veteran* provisions. *See, e.g.*, §§ 202 (reducing time for challenging initial decision); 203 (eliminating equitable tolling by Board); 204 (eliminating agency consideration of certain evidence); 206 (limiting Board's duty to state reasons for decisions); 207 (limiting veterans' right to attorneys' fees). The proposal also would apply only prospectively, Opp. 14, and would not benefit petitioner or any of the hundreds of other veterans whose likely meritorious cases have already been dismissed.[5]

The timing of the letter is also puzzling. The VA waited to propose legislation until six months after the Federal Circuit's decision below, almost two years after the Veterans Court's decision first dismissing petitioner's claim, and three years after this Court's purportedly controlling decision in *Bowles*. This Court has rejected attempts by the government on the eve of certiorari to promise to fix a problem otherwise worthy of this Court's review. *See, e.g.*, *Sims v. Apfel*, 528 U.S. 1018 (1999) (granting certiorari despite government's promise to resolve question presented by regulation); *see* U.S. Opp., *Sims v. Apfel*, No. 98-9537, at 14-15. The Court likewise should reject the government's eleventh-hour attempt to evade this Court's review.

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[5] The complete version of the VA's legislative proposal is neither included in the government's brief nor posted on the VA's website, but it has been posted by a VA "watchdog" website. *See* Larry Scott, VA News Flash, *Shinseki's Proposed Legislation Could Negatively Impact Many Veterans* (May 28, 2010), www.vawatchdog.org/10/nf10/nfmay10/nf052810-5.htm.

3. *This Court should correct the Federal Circuit's erroneous interpretation of* Bowles

The government's position is not only flawed in relying on legislation that will in all likelihood never pass but also in erroneously assuming that *Congress* created the problem in the first instance. The problem stems not from the statute but from the Federal Circuit's misreading of *this Court's* decision in *Bowles*. This Court has not waited for Congress to correct an erroneous interpretation of *Bowles* for other statutes, *see Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), and it should not wait here.[6]

In addition, the government argues that this Court's review is unwarranted because the Federal Circuit's decision "does not conflict" with the decision of any court of appeals. Opp. 6. But a conflict is impossible given the Federal Circuit's exclusive jurisdiction to resolve the issue. 38 U.S.C. § 7292(c). The en banc decision was deeply divided and the majority, solely on the basis of *Bowles*, upset a decade of precedent by two previous en banc Federal Circuit

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[6] Although a "GVR" would be preferable to a denial of certiorari, a GVR would significantly delay the resolution of petitioner's request for disability benefits that already has languished before the agency for four years and before the courts for five years. Pet. 5; *see Lawrence v. Chater*, 516 U.S. 163, 168 (1996) ("[I]f the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate."). As the government's response indicates (Opp. 10), moreover, the court of appeals is unlikely to alter its holding in light of *Reed Elsevier*.

decisions. Only this Court can determine whether the Federal Circuit misread *Bowles* to apply to veterans who for the first time seek judicial review of the VA's decision denying benefits.

When the Federal Circuit in *Kirkendall v. Dep't of the Army*, 479 F.3d 830 (Fed. Cir.), *cert. denied*, 552 U.S. 948 (2007), *declined* to hold that a filing deadline in a veterans' program was jurisdictional, the government sought certiorari. U.S. Pet., *Dep't of the Army v. Kirkendall*, No. 07-19, at 22-23. Yet now that the shoe is on the other foot and the Federal Circuit held that a deadline in a vastly larger veterans' program *is* jurisdictional, the government opposes certiorari. This Court should reject the government's double standard.

Indeed, the circumstances of this case are far more cert-worthy than *Kirkendall*, which was decided consistently with the pro-claimant VA scheme. 479 F.3d at 842. *Kirkendall* was decided pre-*Bowles*, did not alter the status quo, and was an interlocutory decision. And *Kirkendall* involved a relatively small number of veterans whose requests for employment preferences were denied. Pet. 17. The decision below has none of those features and is already imposing great harm on the ability of veterans to obtain disability benefits.

B. The Lower Court Decision is Wrong

1. *Section 7266(a) is a statute of limitations*

The following factors, none of which the government disputes, compel the conclusion that Section 7266(a) is a statute of limitations and not an inflexible jurisdictional limit:

- The first opportunity for a veteran to challenge a VA denial of benefits *in court* is the proceeding before the Veterans Court. Pet. 28.

- Disability proceedings before the Secretary are uniquely pro-veteran. *Id.* 3.

- A proceeding before the Veterans Court is the first time the veteran and the Secretary are adversaries. *Id.*

- Section 7266(a) directs the *veteran* to take action; the time limit does not purport to restrict the power of the court. *Id.* 20.

- Congress passed Section 7266(a) as part of a pro-veteran scheme designed to ensure that veterans obtain judicial review of meritorious benefit denials. *Id.* 18.

- Given the unusually high reversal rate of VA decisions, the Veterans Court's review does not remotely resemble a court of appeals' review of district court decisions. *Id.* 28 & n.12.

In light of the settled pro-veteran canon of statutory construction, Pet. 18, it strains credulity to conclude that Congress intended to foreclose *any form of judicial review* of an erroneous VA denial of benefits where the missed deadline resulted from the VA's own misconduct or, as here, from the very disability for which the government wrongfully denied benefits.

The decision below also conflicts with this Court's unanimous holding in *Bowen v. New York*, 476 U.S. 467, 478 (1986), that the time of review provision for an agency decision denying disability benefits, 42 U.S.C. 405(g), is *not* jurisdictional. The government suggests no reason why Congress would have intended to treat our Nation's veterans more harshly than social security claimants, even though both schemes are imbued with pro-claimant characteristics.

The government is also wrong that while a social security claimant "commences" an entirely "new" "civil action" in district court under Section 405(g), the veteran under Section 7266(a) seeks review "*in an existing case.*" Opp. 8 (emphasis added). The proceedings before the Board and the Veterans Court are different cases with distinct case numbers. *Compare* Pet. App. 74a *with id.* 103a. Similarly, the first time two adversarial parties appear in a caption is the "civil action" filed in the Veterans Court. *Id.* 26a, 74a, 103a.

2. *An "appeal" of agency action under Section 7266 does not render the 120-day time limit jurisdictional*

The government also reiterates the court of appeals' reasoning that a veteran institutes Veterans Court proceedings by filing a "notice of appeal" and that the Veterans Court deferentially reviews Board decisions. *See* Opp. 8-11. *Bowles* does not suggest, however, that the phrase "notice of appeal," regardless of context, automatically renders a time limit jurisdictional. "Rather, *Bowles* stands for the proposition that context . . . is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1247-48.

The context is controlling here. In *Sims v. Apfel*, 530 U.S. 103, 110 (2000), a decision the government fails to acknowledge, this Court specifically warned against comparing the relationship of administrative bodies and the courts to the relationship between lower and upper courts. *See* Pet. 27-29. The Board is not a court. The Board's denial of a claim is no different from the ALJ's denial of social security benefits on behalf of the Commissioner in *Bowen* and the EEOC's rejection of a federal employee's discrimination claim in *Irwin* v. *Department of Veterans' Affairs*, 498 U.S. 89 (1990); *see* Pet. 27-28.

Viewed in context, Congress could not have used the phrase "notice of appeal" as a term of art against the backdrop of *Bowles*—*Bowles* was decided almost two decades after Congress passed Section 7266(a). Rather, Congress used the phrase "notice of appeal" to denote a veteran's formal request for review in the same way

that a complaint under Section 405(g) reflects the claimant's "appeal" of an ALJ or Appeals Council decision. *Heckler v. Day*, 467 U.S. 104, 107 (1984); Pet. 29. In all events, any "interpretive doubt is to be resolved in the veterans' favor." *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994).

Congress repeatedly used the term "appeal" throughout the uniquely pro-veteran non-adversarial statutory scheme to mean *to challenge*. *See* Pet. 29-30 (citing 38 U.S.C. §§ 7104-7107); *see also Percy v. Shinseki*, 23 Vet. App. 37, 43 (2009) ("Substantive Appeal" to the Board from an initial agency decision is not jurisdictional); *accord Enocencio v. Shinseki*, No. 08-1957, 2009 WL 4927985, at *1 (Vet. App. Dec. 22, 2009).

The government similarly errs in relying on the standard of review for the Board's factual findings and the rule of prejudicial error. Opp. 8-9. Again, the veterans' context is identical to the social security context. Under the social security system, a district court must uphold an ALJ's findings of fact under the substantial-evidence test and the rule of prejudicial error applies. Pet. 30-31.

Also inapposite is the holding in *Stone v. INS*, 514 U.S. 386, 406 (1995), that a time limit for a convicted alien to challenge a deportation order in the court of appeals is jurisdictional. Opp. 10. A veteran does not challenge the VA's decision in the court of appeals but does so in the Veterans Court, which is then subject to further review by a court of appeals. It is also highly unlikely that Congress intended to put wounded

veterans on par with convicted aliens facing deportation, rather than on par with disabled citizens seeking social security benefits. Section 7266(a) was passed to ensure, not block, a disabled veteran's access to the courts, and the pro-veteran canon of construction in all events tips the balance if there were any ambiguity as to Congressional intent.

* * *

For veterans returning home from a military conflict after being severely wounded or disabled, benefits are a crucial stepping-stone on the road to resuming a normal life. Yet the decision below shuts the courthouse doors to countless veterans even though history shows that 80% of them on average would prevail. Our veterans deserve better. This Court's review is urgently needed to ensure that the claims of men and women who earned their benefits through sacrifices for this Nation are not lost forever.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 09-1036

In The Supreme Court of the United States

DAVID L. HENDERSON,

Petitioner,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF THE AMICI CURIAE NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC., THE FEDERAL BAR ASSOCIATION, VETERANS LAW SECTION AND VETERANS FOR COMMON SENSE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF APPENDICES	ii
TABLE OF AUTHORITIES	iii
INTERESTS OF THE AMICI	1
STATEMENT	4
SUMMARY OF ARGUMENT	7
ARGUMENT	7
POINT I	7
The Decision of the Federal Circuit will result in the denial of VA benefits to thousands of our nation's most deserving and most impaired veterans	7
POINT II	9
The decision of the Court below was legally incorrect and conflicts with decisions in other Circuits	9
A. § 7266(a) is not "Jurisdictional"	9
B. Other Federal Circuits Disagree with The Federal Circuit	12
C. § 7266(a) is a Statute of Limitations	14
CONCLUSION	16

TABLE OF CONTENTS – Continued

Page

TABLE OF APPENDICES

Declaration of Raouf F. Badawi, M.D. 1a

Veterans for Common Sense, VA Fact Sheet, Updated January 27, 2010 .....3a

Veterans for Common Sense, Consequences of Iraq and Afghanistan Wars, Updated March 13, 2010 .....5a

TABLE OF AUTHORITIES

Page

CASES

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) 10

Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) (en banc) 11

Bowles v. Russell, 551 U.S. 205 (2007) ..... *passim*

Bowen v. City of New York, 476 U.S. 467 (1986) 14, 15

Diaz v. Kelly, 515 F.3d 149 (2d Cir. 2008) 13

Henderson v. Shinseki, 589 F.3d 1201 (2009) 3, 12

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 13, 14

Jaquay v. Principi, 304 F.3d 1276 (Fed. Cir. 2002) (en banc) 14

Reed Elsevier, Inc. v. Muchnick, 559 U.S. ___ (2010), 2010 U.S. LEXIS 2202 ..... 7, 9, 10, 11, 12

Shinseki v. Sanders, 129 S. Ct. 1696 (2009) 11, 12, 15

Stone v. Immigration and Naturalization Service, 514 U.S. 386 (1995) 12

United States v. Dolan, 571 F.3d 1022 (10th Cir. 2009) 13

United States v. Henderson, 536 F.3d 776 (7th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009) 13

STATUTES

8 U.S.C. § 1105a(1) 12

17 U.S.C. § 411(a) 10, 12

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 3664(d) 13

18 U.S.C. § 3731 13

28 U.S.C. § 1331 11

28 U.S.C. § 1338 11

28 U.S.C. § 2244(d) 13

38 U.S.C. § 7105(a) 14

38 U.S.C. § 7261 12

38 U.S.C. § 7266(a) ..... *passim*

42 U.S.C. § 405(g) 15

42 U.S.C. § 2000e(b) 12

42 U.S.C. § 2000e-16(c) 13

OTHER MATERIALS

Belanger HG, Uomoto JM, Vanderploeg RD. The Veterans Health Administration System of Care for Mild Traumatic Brain Injury: Costs, Benefits and Controversies. J. Head Trauma Rehabil. 2009; 24(1):4 6

CAVC Annual Report, FY 2009, http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf 8

Fiscal Year 2008 Report of the Chairman, Board of Veterans' Appeals, p.23 http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2008AR.pdf 8

TABLE OF AUTHORITIES – Continued

Page

S. Rep. No. 100-418, 100th Cong. 2d Sess. 29 (1988) 11

VAOIG Report May 1, 2008, Rep. 08-01023-119 "Follow-up Health Care Inspection VA's Role in Ensuring Services for Operation Enduring Freedom/Operation Iraqi Freedom Veterans after Traumatic Brain Injury Rehabilitation," p.i 6

VAOIG Report May 1, 2008, Rep. 08-01023-119 "Follow-up Health Care Inspection VA's Role in Ensuring Services for Operation Enduring Freedom/Operation Iraqi Freedom Veterans after Traumatic Brain Injury Rehabilitation," p.2 6

VBA Fast Letter 08-36, p.2, at http://www.tvc.state.tx.us/HTML%20Pages%20for%20Frames/VA_Fast_Letters.htm 6

INTERESTS OF THE AMICI

This brief is presented on behalf of the National Organization of Veterans' Advocates, Inc., The Federal Bar Association, Veterans Law Section and Veterans for Common Sense ("VCS"), in support of the petition of David L. Henderson, for a writ of certiorari.[1]

The National Organization of Veterans' Advocates, Inc. ("NOVA") is a not for profit section 501(c)(6) educational organization incorporated in 1993. It is dedicated to train and assist attorneys and non-attorney practitioners who represent veterans, their surviving spouses, and their dependants, before the Veterans Administration, the Board of Veterans' Appeals, the United States Court of Appeals for Veterans Claims ("Veterans Court"), the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), and this Honorable Court.

The foundation of The Federal Bar Association was chartered by Congress as a 501(c)(3) organization in 1954. The missions of the foundation include promoting and supporting legal research and education,

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this brief; all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the Amici Curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

advancing the science of jurisprudence, facilitating the administration of justice, and fostering improvements in the practice of Federal Law.

The purposes of the Veterans Law Section of The Federal Bar Association include: 1) promoting and monitoring the development of Veterans Law; 2) adopting public positions on matters concerning Veterans Law and Military Law effecting veterans' status and dispute resolution in both the public and private sectors; 3) planning, participating, conducting, and publishing as appropriate, services, programs, publications and activities of interest to persons in the legal profession with respect to Veterans Law and Military Law (as the latter affects military service members transitioning from military to veteran status); and 4) promoting high standards of professional competence and ethical conduct.

The views expressed in this brief do not necessarily reflect those of The Federal Bar Association as a whole.

Veterans for Common Sense ("VCS") was formed in August 2002 as a non profit 501(a)(3) organization by war veterans who believe that the people of America are most secure when their country is free, strong, and responsibly engaged with the world. VCS' mission is to raise the unique and powerful voices of veterans so that the nation's military, veterans, freedom and national security are protected and enhanced for this generation and future generations.

In the decision below, *Henderson v. Shinseki*, 589 F.3d 1201 (2009), the Federal Circuit interpreted the opinion of this Court in *Bowles v. Russell*, 551 U.S. 205 (2007), as overruling precedent holding that the time to file an appeal to the Veterans Court in 38 U.S.C. § 7266(a) is subject to equitable tolling. NOVA, VCS and the Veterans Law Section of The Federal Bar Association, believe the *Henderson* decision below is incorrect as a matter of law, and could result in the denial of benefits to thousands of our nation's deserving veterans, particularly those suffering from mental health conditions such as posttraumatic stress disorder and Traumatic Brain Injury which preclude them from complying with the time limits contained within the statute.

In the absence of such equitable tolling, the doors to the Veterans Court will be closed to veterans, their spouses, and dependents, who fail to file their claims within the 120-day period specified in § 7266(a), even if the failure to timely file was due to no fault of their own or even due to the very disability for which benefits are sought in the first instance. The Federal Circuit's decision is expected to create a serious and unjust impediment for many veterans, their spouses, and dependents, in this and future cases, and NOVA, VCS, and the Veterans Law Section of The Federal Bar Association, hope to contribute to this Court's understanding of the issues.

NOVA, VCS, and the Veterans Law Section of The Federal Bar Association, have no interest in the

eventual outcome of the claims underlying Mr. Henderson's appeal.

STATEMENT

David Henderson was discharged from military service in 1952 after being diagnosed with paranoid schizophrenia, while on active duty. That mental disability was subsequently determined by the Department of Veterans Affairs ("the VA") to have rendered him 100 percent disabled. Pet. App. 3a. In August of 2001, proceeding *pro se*, Mr. Henderson, applied to his local VA Regional Office ("RO") for additional monthly compensation based on his need for in-home care because of his service-connected paranoid schizophrenia. The RO denied this claim and the Board of Veterans' Appeals ("the Board"), on August 20, 2004, affirmed the RO's decision. Pet. App. 3a.

On January 12, 2005, 135 days after the Board's decision, Mr. Henderson, still proceeding *pro se*, filed a notice of appeal with the U.S. Court of Appeals for Veterans Claims ("the Veterans Court or the CAVC"). Pet. App. 3a. That appeal was ultimately dismissed, as untimely, by a divided panel of the Veterans Court which relied on this Court's decision, in *Bowles v. Russell*, 551 U.S. 205 (2007), to conclude that the 120-day time limit contained in 38 U.S.C. § 7266(a) is jurisdictional and is not subject to equitable tolling. Pet. App. 76a-82a.

A majority of the United States Court of Appeals for the Federal Circuit ("the Federal Circuit"), affirmed, en banc, the dismissal of Mr. Henderson's appeal. Pet. App. 1a-73a. Although they joined in the majority opinion, the three concurring judges agreed with the three dissenting judges that the rigidity of the decision prohibiting equitable tolling leads to unfairness. Pet. App. 44a. Writing for the dissenters, Judge Mayer went further, characterizing the result as creating a "Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Pet. App. 46a.

Mr. Henderson is an example of one of those most deserving veterans whose appeal would have been heard if he was given the benefit of equitable tolling. His treating psychiatrist explained, that Mr. Henderson is "incapable of rational thought or deliberate decision-making" and "incapable of understanding and meeting deadlines." Amici App. 1a.

There are many deserving veterans who will need the benefit of equitable tolling. For example, there are over 227,000 veterans who served in the Global War on Terror ("GWOT") who are being treated by the VA for mental health issues with over 130,000 of them having been diagnosed with post traumatic stress disorder ("PTSD"). Amici App. 3a. It has been estimated that 770,000 veterans of the GWOT may have sustained PTSD. Amici App. 4a. Also almost 430,000 service members who were deployed in the GWOT have suffered some form of

traumatic brain injury ("TBI"). Amici App 4a. Ten to 15 percent of those with mild TBI report ongoing cognitive difficulties for years, post injury.[2] Three years after completion of initial inpatient rehabilitation for TBI many of these patients continue to have significant disabilities.[3] Moreover, specific attention to the long-term needs of those living with TBI is warranted in part because cognitive and emotional impairments compromise patients' capacity to seek help on their own.[4] In recognition of the cognitive impairments which may be experienced by veterans who have sustained a TBI, the VA in October 2008, published instructions for rating TBI which included guidance that the veterans may experience a decrease in executive functions such as in speed of information processing, goal setting, planning, organizing, prioritizing, self-monitoring, problem solving, judgment, decision making, spontaneity, and flexibility in changing actions when the actions are not productive.[5]

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[2] Belanger HG, Uomoto JM, Vanderploeg RD. The Veterans Health Administration System of Care for Mild Traumatic Brain Injury: Costs, Benefits and Controversies. J. Head Trauma Rehabil. 2009; 24(1):4

[3] VAOIG Report May 1, 2008, Rep. 08-01023-119 "Follow-up Health Care Inspection VA's Role in Ensuring Services for Operation Enduring Freedom/Operation Iraqi Freedom Veterans after Traumatic Brain Injury Rehabilitation," p.i

[4] *Ibid.*, p.2

[5] VBA Fast Letter 08-36, p.2, at http://www.tvc.state.tx.us/HTML%20Pages%20for%20Frames/VA_Fast_Letters.htm

Moreover, the statistics concerning our veterans returning from combat continue to rise. These statistics were secured by Veterans for Common Sense, pursuant to Freedom of Information Act requests.

SUMMARY OF ARGUMENT

The decision of the Federal Circuit has national significance potentially affecting thousands of disabled veterans. Applying the analysis recently utilized by this Court in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ___ (2010), 2010 U.S. LEXIS 2202, section 7266(a), which sets forth the time to file an appeal in the Veterans Court, should be considered not "jurisdictional" and should be subject to equitable tolling. Other Circuits have continued to allow tolling of similar statutes of limitations.

ARGUMENT

POINT I

THE DECISION OF THE FEDERAL CIRCUIT WILL RESULT IN THE DENIAL OF VA BENEFITS TO THOUSANDS OF OUR NATION'S MOST DESERVING AND MOST IMPAIRED VETERANS

The decision of the Federal Circuit will result in the final denial of benefits which have been earned by

thousands of our nation's veterans who are suffering from the effects of PTSD or TBI.

Not only do many veterans' symptoms interfere with their ability to file timely appeals, but many impaired veterans handle their claims themselves. Between 53 and 70 percent of the veterans' claims filed since 2000, have been *pro se*. Henderson petition n.6. In fiscal year ("FY") 2008 only 8 percent of veterans receiving decisions from the BVA were represented by lawyers. The vast majority of veterans were represented by non-lawyer Veterans Service Officers and 12 percent, over 5,000, had no representation at all.[6] That pattern continues in the Veterans Court. In FY 2009, 3,213 appeals, representing 68 percent of the filed appeals, were filed by *pro se* appellants.[7]

Also, in FY 2009, of the appeals which were accepted by the Veterans Court, and which resulted in a merits decision, the Veterans Court found the VA's position to be not substantially justified over 70 percent of the time, resulting in the granting of EAJA fees.[8]

The Federal Circuit's holding that equitable tolling is not available to veterans who fail to file

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[6] Fiscal Year 2008 Report of the Chairman, Board of Veterans' Appeals, p.23 http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2008AR.pdf

[7] At decision there are only 30 percent *pro se* CAVC Annual Report, FY 2009, http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf

[8] *Ibid.*

their appeal in the Veterans Court, within the 120-day period provided by 38 U.S.C. § 7266(a), will deny thousands of badly injured veterans the benefits which they have earned in combat. This Court has the opportunity to prevent those veterans from suffering that great injustice.

POINT II

THE DECISION OF THE COURT BELOW WAS LEGALLY INCORRECT AND CONFLICTS WITH DECISIONS IN OTHER CIRCUITS

A. 7266(a) is not "Jurisdictional"

In deciding that the 120-day appeal period contained in 38 U.S.C. § 7266(a) may not be tolled, the Federal Circuit relied upon this Court's decision, in *Bowles v. Russell*, 551 U.S. 205, 214 (2007), that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement" and that courts "ha[ve] no authority to create exceptions to jurisdictional requirements." Applying that rule to its determination that 38 U.S.C. § 7266(a) "is a notice of appeal or time of review, provision in a civil case" it concluded that the statute is not subject to equitable tolling. Pet. App. 25a.

This Court's recent decision in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ___ (2010), 2010 U.S. LEXIS 2202. demonstrates that the analysis utilized by the Federal Circuit to conclude that § 7266(a) is not subject to equitable tolling, was erroneous.

Reed Elsevier clarified the holding in *Bowles* by stating that a "statutory condition devoid of an express jurisdictional label should [not] be treated as jurisdictional simply because courts have long treated it as such" nor should "all statutory conditions imposing a time limit . . . be considered jurisdictional . . . [rather] context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." Slip opinion 12,13. Rather than relying, exclusively, upon historical treatment of the statute as "jurisdictional" *Reed Elsevier* utilized two tests derived from *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), to conclude that the failure to comply with the copyright registration requirement, contained in 17 U.S.C.A. § 411(a), does not deprive a federal court of jurisdiction to adjudicate a copyright infringement claim which had been filed by a non registering copyright holder. Test one, a general approach, distinguishes "jurisdictional" conditions from claim-processing requirements or elements, of a claim by examining whether the Legislature "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." This Court's application of the first test to § 411(a) showed that the statute did not clearly state that the registration requirement is jurisdictional. Test two looks at whether § 411(a)'s registration requirement is located in a provision separate from those provisions granting federal courts subject matter jurisdiction over the respective claims. Applying the second test, this Court concluded that the registration requirement is located in a provision

separate from 28 U.S.C. §§ 1331 and 1338 which confer subject matter jurisdiction. The concurring opinion adds that application of the rule in *Bowles* is appropriate only where there is a long line of this Court's decisions finding a statute to be jurisdictional which has been left undisturbed by Congress.

Applying the *Reed Elsevier* tests to § 7266(a) leads to the conclusion that this statute is not jurisdictional. First, there is no undisturbed long line of cases finding the statute to be jurisdictional. Neither does § 7266(a) clearly state that the 120-day appeal filing requirement is jurisdictional. Also, as recognized by the Federal Circuit, in the twelve years since the determination in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), that § 7266(a) is subject to equitable tolling, "Congress has not amended that statute in a way which would disturb *Bailey*." Pet. App. 31a. Additionally, there are unique policy considerations which suggest that Congress never intended § 7266(a) to be utilized to close the courthouse door to impaired veterans whose impairments prevent them from filing a timely appeal in the Veterans Court. To the contrary, Congress created the Veterans Court in order to "ensure that veterans . . . receive all benefits to which they are entitled." S. Rep. No. 100-418, 100th Cong. 2d Sess. 29 (1988). For example, as this Court noted in *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009), the veterans' claims process "is not truly adversarial" and "the veteran is often unrepresented during the claims proceedings (citations omitted)." *Id.* at 1707. Also, "Congress has

made clear that the VA is not an ordinary agency" and that the "VA has a statutory duty to help the veteran develop his or her benefits claim (citations omitted)." *Id.* at 1707.

Applying the second *Reed Elsevier* test leads to the same conclusion. This statute is not jurisdictional. Thus, the time to appeal provision in § 7266(a) is located separate from the provisions enumerating the subject matter jurisdiction of the Veterans Court. These jurisdictional provisions are contained in § 7261. Accordingly, application of the *Reed Elsevier* analysis demonstrates that § 7266(a) is most properly viewed as a non-jurisdictional statute similar to 17 U.S.C. § 411(a) and 42 U.S.C. § 2000e(b).

Using the *Reed Elsevier* analysis, *Stone v. Immigration and Naturalization Service*, 514 U.S. 386 (1995) can be understood as a decision controlled by a long line of this Court's cases, undisturbed by Congress, and characterizing 8 U.S.C. § 1105a(1) as "jurisdictional" and not subject to tolling. Accordingly, *Stone* offers no guidance for whether § 7266(a) is jurisdictional and, to the extent that the Federal Circuit's decision in *Henderson* is based on *Stone*, its reliance is misplaced. Pet. App. 26a.

B. Other Federal Circuits Disagree with The Federal Circuit

Not only does the application of *Reed Elsevier* show that § 7266(a) is not jurisdictional, but the Federal Circuit's decision, in *Henderson*, conflicts with

decisions of other Circuit Courts, which hold that equitable extension to filing deadlines survive the *Bowles* decision. See, e.g., *Diaz v. Kelly*, 515 F.3d 149 (2d Cir. 2008) (28 U.S.C. § 2244(d) may be equitably tolled); *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009) (exception to time limit in 18 U.S.C. § 3731); and *United States v. Dolan*, 571 F.3d 1022 (10th Cir. 2009) (18 U.S.C. § 3664(d) may be tolled). Amici do not contend that the Federal Circuit committed error by failing to extend the deadline for Mr. Henderson to file his "notice of appeal" from the Board's decision. Rather, Amici contend that the Federal Circuit should have tolled the time for Mr. Henderson to file his appeal to the Veterans Court for the period during which his mental impairment precluded him from timely filing an appeal. As was noted by the Seventh Circuit in *United States v. Henderson*, there is a significant difference between tolling, which involves the question as to when a time limit begins to run, or is suspended, and an exception to a statutorily imposed time limit.

While *Bowles* did not address equitable tolling, this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), specifically held that equitable tolling is available with respect to the 30-day limitations period for the commencement of an action for wrongful discharge against the United States under 42 U.S.C. § 2000e-16(c). In *Irwin*, this Court reasoned that "time requirements in lawsuits between private litigants are customarily subject to

equitable tolling (citations omitted)" and held that "the same reputable presumption of equitable tolling applicable to suits against private defendants, should also apply to suits against the United States." *Irwin* at 95-96.

C. 7266(a) is a Statute of Limitations

Another reason while the Federal Circuit committed error in denying equitable tolling of § 7266(a) is that the 120-day time period contained § 7266(a) is like a "statute of limitations" discussed in *Bowen v. City of New York*, 476 U.S. 467 (1986), rather than a *Bowles* "time to file" requirement. A claimant who wishes to commence a lawsuit against the Secretary of Veterans Affairs to challenge a final denial of benefits by the VA must file a "notice of appeal," in the Veterans Court, within 120-days of the date that an adverse Board of Veterans' Appeals decision is mailed to that claimant. Calling this appeal document a "notice of appeal" distinguishes it from the "notice of disagreement" which is the document which a claimant must timely file to begin the administrative appellate review following an unfavorable rating decision. 38 U.S.C. § 7105(a). In contrast to commencing an administrative challenge, the filing of a "notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first action taken by a veteran in a court of law." *Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002) (en banc).

This Court acknowledged in *Sanders*, at 1707, that the VA is not an ordinary agency and that "Congress has expressed special solicitude for the veterans' cause." Clearly, the VA claims adjudication system is intended to be even more protective of appellants than is the Social Security Disability system, which was the subject of *Bowen v. City of New York*, 476 U.S. 467 (1986). Yet, in *Bowen*, this Court held that the 60-day period contained in 42 U.S.C. § 405(g), for filing a federal court appeal challenging the denial of benefits by the Social Security Administration, is not jurisdictional and is subject to equitable tolling. The *Bowen* decision notes that the Social Security Act was designed by Congress, to be "unusually protective" of claimants, and that permitting equitable tolling of the 60-day period is fully consistent with the overall congressional purpose and was not eschewed by Congress. *Id.* at 480.

Like the appeal period in § 405(g), the appeal period in § 7266(a) is properly found to be subject to equitable tolling.

CONCLUSION

This Court should grant Mr. Henderson's petition for certiorari because the decision of the Federal Circuit conflicts with the decisions of other circuits and because that erroneous decision has the potential to deny thousands of veterans the benefits to which they are otherwise entitled.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DAVID L. HENDERSON, Appellant,	)	
v.	)	No. 05-0090
R. JAMES NICHOLSON, Security of Veterans Affairs, Appellee.	)	

DECLARATION OF DR. RAOUF F. BADAWI, M.D.

1. My name is Raouf F. Badawi. I am a psychiatrist licensed to practice in North Carolina.

2. David Henderson is my patient. I have been treating Mr. Henderson since 1987.

3. On or about September 19, 2005, I sent a letter to the Hon. William P. Green, Jr., Judge, U.S. Court of Appeals for Veterans Claims. This Declaration incorporates the statements made in that letter. A copy of the letter is attached to this Declaration as Exhibit A.

4. For the reasons stated in my September 19, 2005 letter, I believe that Mr. Henderson's medical and psychiatric impairments render him incapable of rational thought of deliberate decision-making, and he is unable to handle his own affairs and function in society without help from his wife. Based on that conclusion, it is my medical judgment that since August 2004, Mr. Henderson has been incapable of

understanding and meeting deadlines. On that basis, I have concluded that his inability to make timely filings with this Court is a direct result of his mental and physical impairments.

The foregoing Declaration is true to the best of my knowledge, understanding, and belief. It is made under penalty of perjury to the laws of North Carolina and the United States.

Dated this 13 day of March, 2007.

/s/ Raouf Badawi MD
Dr. Raouf F. Badawi

STATE OF NORTH CAROLINA)
) ss:
COUNTY OF Guilford)

The following instrument was acknowledged before me this 13th day of March, 2007, by Dr. Raouf F. Badawi.

Witness my hand and official seal.

/s/ Janet A. Jackson
Notary Public

My Commission expires: 3/19/10

[SEAL]

VETERANS
FOR COMMON
SENSE

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VA Fact Sheet
Consequences of Iraq and Afghanistan Wars
Updated January 27, 2010

U.S. Veteran Patients Treated at VA: 480,324
Veteran Disability Claims Filed Against VA: 442,413

Chart #1, U.S. Troops Deployed to Iraq and Afghanistan War Zones[1]

Deployed to War Zones	Service Members Still in Military	Percent in Military	Veterans Now Eligible for VA	Percent Veterans
1,946,042	786,405	40%	1,159,637	60%

Prepared by Veterans for Common Sense using documents obtained through the Freedom of Information Act:

[1] Department of Veterans Affairs (VA), "VA Benefits Activity: Veterans Deployed to the Global War on Terror," Nov. 18, 2009

Chart #2, Iraq and Afghanistan Veteran Patients Treated by VA[2] [3]

Category	Number of Veterans	Percent
Veteran Patients	480,324	41% of Veterans
Mental Health Patients	227,205	47% of Patients
PTSD Patients	134,103	28% of Patients

Chart #3, Iraq and Afghanistan Veterans' Claims Against VA[4]

Category	Number of Veterans	Percent
Disability Claims Filed	442,413	38% of Veterans
Claims Pending	63,397	16% of Claims Filed
Approved PTSD Claim	67,052	50% of PTSD Patients

[2] VA, "analysis of VA Health Care Utilization Among US Global War on Terrorism Veterans," Oct. 2009.

[3] VA, "VA Facility Specific OIF/OEF Veterans Coded with Potential PTSD Through 3rd Qt FY 2009," Sep. 2009.

[4] VA, "VA Benefits Activity: Veterans Deployed to the Global War on Terror, Nov. 18, 2009.

VETERANS
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Consequences of Iraq and Afghanistan Wars

Updated March 13, 2010

90,172 U.S. Military Battlefield Casualties

Chart #1, Official Service Member of Battlefield Casualties

Casualty Category	Iraq War[1]	Afghanistan War[2]	Both Wars
Deaths	4,371	1,005	5,376
Wounded in Action	31,716	5,190	36,906
Medically Evacuated Due to Injury or Disease	38,639	9,251	47,890
Total U.S. Casualties	**74,726**	**15,446**	**90,172**

Prepared by Veterans for Common Sense (VCS) using documents obtained from the Department of Defense (DoD) under the Freedom of Information Act (FOIA). If you use this information, then please cite VCS and our use of FOIA.

[1] DoD, "global War on Terrorism – Operation Iraqi Freedom, By Casualty Category Within Service, March 19, 2003, Through March 6, 2010" (Iraq War).

[2] DoD, "Global War on Terrorism – Operation Enduring Freedom, By Casualty Within Service, October 7, 2001, Through March 6, 2010" (Afghanistan War).

Chart #2, Scientific Estimates of TBI and PTSD Casualties

Casualty Category	Estimated Casualties	Estimated Percent
Traumatic Brain Injury[3]	429,000	19.5% of 2.2 million
Post Traumatic Stress Disorder[4]	770,000	35% of 2.2 million

[3] RAND: "Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans," Apr. 17, 2008.

[4] Stanford University and Naval Postgraduate School, "A Dynamic Model for Posttraumatic Stress Disorder Among U.S. Troops in Operation Iraqi Freedom," September 2009.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 09-1036

IN THE

Supreme Court of the United States

DAVID L. HENDERSON,

Petitioner,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICUS CURIAE PARALYZED VETERANS OF AMERICA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THIS COURT'S RECENT DECISION IN *REED ELSEVIER, INC. V. MUCHNICK* CONTROLS, AND THE FEDERAL CIRCUIT SHOULD BE GIVEN THE OPPORTUNITY TO ANALYZE 38 U.S.C. § 7266 UNDER THE CORRECT STANDARD. 4

II. THE FEDERAL CIRCUIT'S DECISION SWEEPS TOO BROADLY AND ALREADY HAS HAD HARMFUL CONSEQUENCES TO DISABLED VETERANS. 6

A. The Federal Circuit Improperly Sweeps Two Different Appeals Situations Into The Same Category; Under Prior Case Law, The Court Distinguished Between Filings That Were Late But Excusable And Filings That Were Misdirected. 7

Contents

Page

i. For disabled veterans, such as Mr. Henderson and the members of Paralyzed Veterans of America, the Federal Circuit's decision is doubly punishing. ... 8

ii. The Federal Circuit's decision rewards VA for thwarting veterans' attempts to appeal. ... 12

B. This Court Regularly Counsels Against Overly Broad Application of Precedent. 14

C. Congress Has Not Changed 38 U.S.C. § 7266 to Prohibit Equitable Tolling. 16

III. CONGRESS CREATED THE COURT OF APPEALS FOR VETERANS CLAIMS TO PROVIDE JUDICIAL REVIEW OF VETERANS APPEALS FROM THE VA ADJUDICATION PROCESS AND DID NOT MAKE 38 U.S.C. § 7266 JURISDICTIONAL. .. 17

CONCLUSION 20

TABLE OF CITED AUTHORITIES

Page

CASES

Arbas v. Nicholson, 403 F.3d 1379 (Fed. Cir. 2005) 7, 9

Arbaugh v. Y&H Corporation, 546 U.S. 500 (2006) 4, 5

Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) (en banc) ..... *passim*

Barrett v. Principi, 363 F.3d 1316 (Fed. Cir. 2004) 7, 8, 9, 19

Bethea v. Derwinski, 2 Vet. App. 252 (1992) 18

Bowen v. City of New York, 476 U.S. 467 (1986) 19

Bowles v. Russell, 551 U.S. 205 (2007) ..... *passim*

Bragdon v. Abbott, 524 U.S. 624 (1998) 16

Brandenburg v. Principi, 371 F.3d 1362 (Fed. Cir. 2004) 13

Harris v. Shinseki, 2010 WL 668926 (Feb. 26, 2010) 12

Henderson v. Shinseki, 589 F.3d 1201 (Fed. Cir. 2009) (en banc) ..... *passim*

Cited Authorities

Page

Hohn v. United States, 524 U.S. 236 (1998) 15

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) ..... *passim*

Irwin v. Shinseki, 23 Vet. App. 128 (2009) 12, 13

Jaquay v. Principi, 304 F.3d 1276 (Fed. Cir. 2002) (en banc) 7

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) 14

Lorillard v. Pons, 434 U.S. 575 (1978) 16

McNutt v. GMAC, 298 U.S. 178 (1936) 18

Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010) 2, 4, 5, 6

Rickett v. Shinseki, Vet. App. No. 09-2493 (March 19, 2010) 13, 14, 18

Santana-Venegas v. Principi, 314 F.3d 1293 (Fed. Cir. 2002) 7, 13

Santoro v. Principi, 274 F.3d 1366 (Fed. Cir. 2001) 13

Shinseki v. Sanders, 129 S. Ct. 1696 (2009) 15

Page

Stambush v. Shinseki, 2010 WL 318493 (Jan. 28, 2010) 12

State Oil Co. v. Khan, 522 U.S. 3 (1997) 14

Union Pacific R. Co. v. Locomotive Engineers and Trainmen General Committee Of Adjustment, Central Region, 130 S. Ct. 584, 558 U.S. __ (2009) 17, 18

United States v. Brockamp, 519 U.S. 347 (1997) 17

STATUTES AND REGULATIONS

36 U.S.C. §§ 170101-170111 (2006) 1

38 U.S.C. § 1705(a)(4) (2006) 11

38 U.S.C. § 1710 (2006) 11

38 U.S.C. §§ 7101-7105 (2006) 7

38 U.S.C. § 7105(b)(2) (2006) 10

38 U.S.C. § 7252 (2006) 5

38 U.S.C. § 7266 (2006) ..... *passim*

38 U.S.C. § 7266(a) 5, 10, 17

Cited Authorities

Page

38 C.F.R. § 20.202 (2009) 10

Veterans Benefits Improvement Act of 1994, Pub. L. No. 103-446, 108 Stat. 4670 (Nov. 2, 1994) 16

Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 (Dec. 27, 2001) 16

Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4116 (Nov. 18, 1988) . 16, 18

Veterans Programs Enhancements Act of 1998, Pub. L. No. 105-368, 111 Stat. 3315 (Nov. 11, 1998) 16

MISCELLANEOUS

36 C.J.S. Federal Courts § 316 (June 2009) 6

INTEREST OF AMICUS CURIAE[1]

Paralyzed Veterans of America is a non-profit veterans service organization founded in 1946 and chartered by the Congress of the United States. *See* 36 U.S.C. §§ 170101-170111 (2006). The organization has more than 15,000 members; each is a veteran of the Armed Forces of the United States who suffers from an injury or disease of the spinal cord. Paralyzed Veterans of America's statutory purposes include: acquainting the public with the needs and problems of paraplegics; promoting medical research in the several fields connected with injuries and diseases of the spinal cord; and advocating and fostering complete and effective reconditioning programs for paraplegics. *Id.*

Paralyzed Veterans of America carries out its statutory purposes by operating various beneficial programs, such as providing free representation before the Department of Veterans Affairs (VA or agency) to its members and other veterans, dependents, and survivors who have filed claims with the agency seeking benefits authorized by Congress. Paralyzed Veterans of America also provides free legal services to members and other veterans, dependents, and survivors seeking judicial review of agency benefit decisions. Because the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae* has made a monetary contribution to its preparation or submission. The parties have been given at least 10 days notice of amicus' intention to file and have consented to the filing of this brief. Such consents are being lodged herewith.

United States Court of Appeals for the Federal Circuit's decision in *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (*en banc*), results in the denial of judicial review of agency benefit decisions, Paralyzed Veterans of America has a strong interest in seeking to have this Court review – and reverse – the *Henderson* decision.

SUMMARY OF ARGUMENT

As this Court's March 2, 2010, decision in *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237 (2010), shows, questions of whether a statute should be deemed "jurisdictional" continue to bedevil the federal circuit courts of appeals. In *Reed Elsevier*, the Court harmonized its precedents on jurisdiction and provided guidance on the application of *Bowles v. Russell*, 551 U.S. 205 (2007). Given that the Federal Circuit based its *Henderson* decision on *Bowles* but did not have the benefit of the clarifying analysis in *Reed Elsevier*, and given that 38 U.S.C. § 7266 (2006) should be subject to that analysis, the safest course of action in this matter is to grant Petitioner's request, vacate the decision, and remand to permit the lower court to apply the most recent precedent.

Even without this new precedent, the Federal Circuit's decision should not stand. Petitioner Mr. Henderson and the dissent in the Federal Circuit's *en banc* decision have eloquently explained the errors in the decision below and set forth reasons for this Court to grant certiorari and review the matter. Petition at 11-32; *Henderson*, 589 F.3d at 1221-33. Paralyzed Veterans of America writes to support Mr. Henderson's petition and to further argue that Congress did not and

could not have intended the interpretation of 38 U.S.C. § 7266 adopted by the Federal Circuit or the consequences that result from the interpretation, and certiorari should be granted.

The Federal Circuit's decision will harm veterans. Many veterans with severe disabilities, such as the members of Paralyzed Veterans of America, are prevented by those disabilities from participating in the normal activities of daily life for long periods of time. A disabled veteran may be hospitalized and rehabilitating for well more than 120 days, without normal access to mail, and may unknowingly lose appeal rights as a result. When appeal rights are lost, so are any chances of the earliest possible effective date for the assignment of benefits – benefits that include medical care that may be essential to the veteran.

The Federal Circuit's decision has already had the effect of rewarding VA for thwarting veterans' attempts to appeal. Using *Henderson*, the Court of Appeals for Veterans Claims has dismissed appeals where VA held or misdirected a veteran's appeal-related correspondence, causing the veteran to lose his appeal rights. Under prior case law, the veteran's misdirected pleading could be construed as timely filed, but now the veteran has no recourse in this situation except to start the VA's lengthy claims process anew. Congress could not have intended this result when making judicial review available to veterans.

Paralyzed Veterans of America asks that this Court grant Mr. Henderson's petition and review and reverse the Federal Circuit's decision.

ARGUMENT

I. THIS COURT'S RECENT DECISION IN *REED ELSEVIER, INC. V. MUCHNICK* CONTROLS, AND THE FEDERAL CIRCUIT SHOULD BE GIVEN THE OPPORTUNITY TO ANALYZE 38 U.S.C. § 7266 UNDER THE CORRECT STANDARD.

In *Reed Elsevier*, this Court noted, "While perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice." *Reed Elsevier*, 130 S.Ct. 1237, 559 U.S. __, slip op. at 5 (Mar. 2, 2010). The Court went on to explain that the correct analysis in determining whether a statute imposes a jurisdictional requirement depends upon whether Congress has so stated, and cited *Arbaugh v. Y&H Corporation*, 546 U.S. 500 (2006), as the relevant test. *Id.*, slip op. at 6. The Court further explained that *Bowles* did not "hold that all statutory conditions imposing a time limit should be considered jurisdictional." *Id.*, slip op. at 12. Rather, the Court cautioned that *Bowles* should be read for its analysis, not its result, and that the correct analysis requires reviewing context in determining whether a statute imposes the type of requirement "properly ranked as jurisdictional absent an express designation." *Id.*, slip op. at 13.

The majority opinion of the Federal Circuit in *Henderson* does not cite *Arbaugh*, much less undertake the analysis announced in that case. Rather, the court relied solely upon *Bowles* to find that 38 U.S.C. § 7266 is a "time of review" provision and therefore

jurisdictional.[2] *Henderson*, 589 F.3d at 1212. Once the Federal Circuit determined that 38 U.S.C. § 7266 was jurisdictional, not a statute of limitations, it followed under the court's analysis of *Bowles* that equitable tolling could not be available to veterans seeking review in the Court of Appeals for Veterans Claims because Congress did not expressly say so. *Id.* at 1216.

Under the guidance of *Reed Elsevier*, this analysis cannot be correct. The first step, using *Arbaugh's* criteria, should focus on whether Congress specifically intended a statute to be jurisdictional.[3] On its face, 38 U.S.C. § 7266 is not clearly labeled a jurisdictional statute. *See, e.g., Henderson*, 589 F.3d at 1224-30 (dissent analysis of non-jurisdictional nature of § 7266). If Congress did not intend the statute to be jurisdictional,

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[2] In relevant part, 38 U.S.C. § 7266 states:

> a) In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120-days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

38 U.S.C. § 7266(a).

[3] Mr. Henderson's petition was also filed without the benefit of this Court's *Reed Elvesier* decision. However, similar to the analysis in that case, Mr. Henderson argues that Congress determined the jurisdiction of the Court of Appeals for Veterans Claims in a different statutory section, 38 U.S.C. § 7252 (2006), labeled "Jurisdiction; finality of decisions," indicating that Congress intended § 7252, not § 7266(a) to define the court's jurisdiction. Petition at 20-21.

then the rebuttable presumption favoring the availability of equitable tolling in suits against the government should apply.[4] *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

As it is common practice for this Court to remand for application of a new precedent, the Court should do so here. *See, e.g.*, 36 C.J.S. Federal Courts § 316 (June 2009). Because *Elsevier* clarified the correct analysis a mere few months after *Henderson* issued, the Federal Circuit did not have the benefit of that clarification, and a grant of Mr. Henderson's petition and remand to apply the correct analysis should be considered.

II. THE FEDERAL CIRCUIT'S DECISION SWEEPS TOO BROADLY AND ALREADY HAS HAD HARMFUL CONSEQUENCES TO DISABLED VETERANS.

The vast majority of claims filed with VA are filed by veterans seeking benefits for their disabilities. To these veterans, whether to apply this Court's decision in *Bowles* to 38 U.S.C. § 7266 or whether to characterize the statute as a "statute of limitations" or a "timing of review provision," *Henderson*, 589 F.3d at 1211, sounds like an academic or theoretical inquiry. But, by extending this Court's inapposite holding in *Bowles* to 38 U.S.C. § 7266 and characterizing the statute as jurisdictional, the Federal Circuit has caused actual harm to disabled veterans claiming benefits. These veterans, who may

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[4] The Federal Circuit had previously held that there was no express congressional intent that tolling should not apply. *Bailey v. West*, 160 F.3d 1360 (Fed.Cir.1998) (*en banc*).

have either misfiled a notice of appeal with the VA or the agency's Board of Veterans' Appeals (Board)[5] or filed late because of their disability, as Mr. Henderson did, had no idea that their minor errors would have significant, fatal consequences to their claims.

A. The Federal Circuit Improperly Sweeps Two Different Appeals Situations Into The Same Category; Under Prior Case Law, The Court Distinguished Between Filings That Were Late But Excusable And Filings That Were Misdirected.

Over a number of years, the Federal Circuit had developed two lines of jurisprudence, one dealing with veterans who had misfiled appeals-related documents with VA, *see, e.g.*, *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (*en banc*) (veteran misfiled reconsideration); *Santana-Venegas v. Principi*, 314 F.3d 1293 (Fed. Cir. 2002) (veteran misfiled at VA Regional Office), and one dealing with veterans whose disability caused them to be unable to meet the filing deadline. *See, e.g.*, *Barrett v. Principi*, 363 F.3d 1316 (Fed. Cir. 2004) (mental illness may have prevented timely filing); *Arbas v. Nicholson*, 403 F.3d 1379 (Fed. Cir. 2005) (heart condition may have prevented timely filing). Although each line of cases derived from *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), each is distinct and involves analytically

[5] The Board is a subpart of the VA responsible for handling appeals of benefits claims within the agency. *See, e.g.*, 38 U.S.C. §§ 7101-7105 (2006). The Board is a nonadversarial forum, but the time for appeal to the Court of Appeals for Veterans Claims begins to run upon issuance of the Board's decision. 38 U.S.C. § 7266.

different scenarios – one in which a veteran attempts to protect his rights by filing something but falls short or is impeded by his litigation adversary, and another in which the veteran's disability prevents him from even protecting his rights. These distinctions were based in part on *Irwin*, in which this Court stated that equitable tolling is available (1) "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period," or (2) "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96.

Although the Federal Circuit had painstakingly developed each line of cases, in *Henderson* the Federal Circuit suddenly wiped out both the lines of cases and any analytical distinction. Instead of case-by-case analysis, the Federal Circuit has imposed a blanket rule, even though Congress has done nothing to require one.

i. For disabled veterans, such as Mr. Henderson and the members of Paralyzed Veterans of America, the Federal Circuit's decision is doubly punishing.

It is difficult to imagine that Congress would create a system in which disabled veterans could seek redress against VA when their benefit claims are denied, and then punish those same veterans for being disabled and unable to protect their rights. In *Barrett*, the Federal Circuit noted, "It would be both ironic and inhumane to rigidly implement section 7266(a) because the condition preventing a veteran from timely filing is often the same

illness for which compensation is sought." *Barrett*, 363 F.3d at 1320; *see also Arbas*, 403 F.3d at 1381.[6] In *Henderson*, however, the Federal Circuit has essentially found that Congress did intend to treat veterans in an ironic, inhumane manner through rigidly interpreting § 7266. *See Henderson*, 589 F.3d at 1220-21 (concurring judges agreeing that the "rigid deadline of the existing statute can and does lead to unfairness.")

It is well known that the VA has a backlog of cases and that a veteran may wait years for a decision on his claim.[7] Because there are no time requirements upon

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[6] In *Arbas*, the Federal Circuit considered the effects of physical disabilities:

> There are a myriad of physical illnesses or conditions that impair cognitive function or the ability to communicate. Solely by way of example, while a stroke victim does not suffer from a mental illness, it would be manifestly unjust to refuse tolling if the stroke were sufficiently incapacitating. The same could be true of one who has suffered severe head trauma or a heart attack. In other cases, one may retain full consciousness but still be unable to speak or communicate effectively, as may be the case for those in extreme pain or who have been immobilized. These examples are not intended as an exhaustive list of conditions that warrant tolling.

Arbas, 403 F.3d at 1381.

[7] *See, e.g.*, VA Claims Backlog Ready to Hit 1 Million, Associated Press (June 18, 2009), available at *http://www.armytimes.com/news/2009/06/ap_vaclaimsbacklog_061809/*.

the VA or Board, the veteran cannot control when a decision is issued or when the 120-day appeal period in § 7266(a) may begin to run. A veteran could file a "substantive appeal," the last step he is responsible for in the agency process when appealing to the Board, 38 U.S.C. § 7105(b)(2); 38 C.F.R. § 20.202 (2009), and a year or two later a Board decision may simply appear in the mail one random day.

This unpredictability can result in a heavy burden on veterans with severe disabilities, such as paraplegia,[8] whose conditions and complications from those conditions may require lengthy hospitalization and rehabilitation at specialized facilities.[9] An appeal-

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[8] Paraplegia is a general term for spinal cord injury and describes "the condition of a person who has lost feeling and/or is not able to move the lower parts of his/her body." Understanding Spinal Cord Injury and Functional Goals, Spinal Cord Injury Info Sheet, University of Alabama, *available at http://images.main.uab.edu/spinalcord/pdffiles/info-4.pdf*. Depending on the location of the injury to the spinal cord, a person with a paralyzing condition may lose the ability to use his arms and legs, may have his lung function affected, and will have many other body systems affected as well. *See id.*, *see also* Spinal Cord Injury, Paralyzed Veterans of America, *http://www.pva.org/site/PageServer?pagename=injury_main*.

[9] For example, pressure ulcers are one of the most common health risks for paralyzed people and can turn into life-threatening infection; surgical care of a pressure ulcer may require "lengthy hospitalization." Pressure Ulcer Treatment, Northwest Regional Spinal Cord Injury System, *available at http://sci.washington.edu/info/newsletters/articles/05fall_pressureulcers.asp*; *see also* Medical Services Program, Paralyzed Veterans of America, available at *http://www.pva.org/site/PageServer?pagename=benefits_medical_commoncomplications*.

preserving action may suddenly be required of them when they are in no position to give it thoughtful attention. As an example, while the VA has more than 900 clinics and facilities nationwide, *see* VA Organizational Briefing Book (June 2009), *available at http://www4.va.gov/ofcadmin/docs/vaorgbb.pdf*, the agency has only 24 centers, called "SCI Centers," that specialize in the treatment of spinal cord injury and disease. *See* SCI Centers, Dep't of Veterans Affairs, *http://www.sci.va.gov/sci_centers.asp*. These centers may treat all eligible SCI veterans. 38 U.S.C. § 1705(a)(4) (2006); 38 U.S.C. § 1710 (2006). An injured veteran such as a Paralyzed Veterans of America member who requires extensive hospitalization and surgical intervention may find himself far from home, even at the nearest SCI Center. It is not difficult to imagine that a person's daily business, such as answering the mail, might be disrupted in this situation. Yet, under the Federal Circuit's decision, a paralyzed veteran seeking service connection or an increased rating for his disability may well lose his appeal rights should he be receiving treatment for his disability at the same time the Board happens to issue a decision in his case. The clock starts ticking, no matter whether anyone is home to hear it.

There is no evidence in 38 U.S.C. § 7266, or in any of chapter 72 for that matter, that Congress intended such a result. The Federal Circuit erred in imposing this burden, and the Court should grant Mr. Henderson's petition.

ii. The Federal Circuit's decision rewards VA for thwarting veterans' attempts to appeal.

For veterans who may have misdirected their filings to VA instead of the Court of Appeals for Veterans Claims, *Henderson* has already produced harsh results. An unhappy byproduct of *Henderson* has been decisions such as *Irwin v. Shinseki*, 23 Vet. App. 128 (2009). In *Irwin*, the veteran mailed his notice of appeal one week after the Board decision, but misdirected the notice to the Board, rather than to the court. The Board ultimately forwarded it to the court more than four months later, past the 120-day appeal period. Based on *Bowles* and *Henderson*, the Court of Appeals for Veterans Claims dismissed, finding the attempt to file insufficient and the Board's inaction irrelevant. *Irwin*, 23 Vet.App. at 131. Since *Irwin v. Shinseki* was decided, the court has issued at least 30 similar decisions according to a Westlaw search.[10]

[10] Most of these decisions are single-judge memoranda, simply applying *Henderson* and *Irwin v. Shinseki*. *See, e.g.*, *Harris v. Shinseki*, 2010 WL 668926 (Feb. 26, 2010). In some instances, the judges struggle with the fact that VA inaction was fatal to the veteran's claim, but then dismiss nonetheless. For example, in *Stambush v. Shinseki*, 2010 WL 318493 (Jan. 28, 2010), Judge Moorman stated:

> The Court notes the failure of the Board to determine that the appellant's August 2008 document that, in the first line of the correspondence, stated that the appellant wished "to appeal the [B]oard decision" was a misdirected NOA, and the Board mailed the correspondence to

(Cont'd)

Perhaps more shocking is the recent decision of *Rickett v. Shinseki*, Vet. App. No. 09-2493 (March 19, 2010). In *Rickett*, the veteran attempted to file his notice of appeal but mistakenly mailed it to VA's Office of General Counsel. At the time, the veteran had roughly fifty days remaining in his appeal period. One might expect the agency's attorneys to recognize the significance of a notice of appeal, but no one in the VA Office of General Counsel acted upon Mr. Rickett's notice for several weeks, and then it was to forward it to the VA Regional Office in Waco, Texas. *Id.*, slip op. at 1-2. The appeal period then expired before the veteran knew about his error. The Court of Appeals for Veterans Claims dismissed, stating "This matter is firmly controlled by *Irwin* and *Henderson*." *Id.*, slip op. at 2.

The problem presented in cases like *Irwin v. Shinseki* is not new; the Federal Circuit has dealt with many cases with similar facts. *See, e.g., Santoro v. Principi*, 274 F3d 1366 (Fed. Cir. 2001) (misaddressed appeal), *Brandenburg v. Principi*, 371 F3d 1362 (Fed. Cir. 2004) (misfiled at Board), *Santana-Venegas v. Principi*, 314 F3d 1293 (Fed. Cir. 2002) (misfiled at Regional Office); *see also Henderson*, 589 F3d at 1220-21 (concurrence, noting that difficulties in navigating the system "are not merely hypothetical.") In each case, a veteran misdirected a filing intended for the Court of

(Cont'd)

> the RO rather than to this Court. The Court takes no pleasure in granting the Secretary's motion to dismiss under such circumstances. Unfortunately, without congressional authority, the Court lacks the jurisdiction to impose a remedy in this appeal.

Appeals for Veterans Claims to the VA, and in each case the VA either lost or held the jurisdictionally significant document until it was too late for the veteran to appeal. Under the Federal Circuit's prior case law, however, these cases could be dealt with and a fair result obtained. *See Henderson*, 589 F3d at 1208 (discussing prior cases).

What is new, and what *Rickett* makes so clear, is that under the sweeping interpretation of *Henderson*, now VA may act (or fail to act) with impunity, no matter whether its actions are intentional or accidental. There is no penalty on VA, and no mechanism for a veteran to regain the lost opportunity to appeal.

Congress did not intend this result, and the Court should take this opportunity to review and correct the Federal Circuit's interpretation.

B. This Court Regularly Counsels Against Overly Broad Application of Precedent.

The Federal Circuit erred in placing too much emphasis on one comment in this Court's *Bowles* decision: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles*, 551 U.S. at 214. In so broadly applying *Bowles* to overturn two distinct branches of its prior precedents, the Federal Circuit has run afoul of this Court's regular admonitions to carefully construe precedent. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008) ("Courts do not normally overturn a long line of earlier cases without mentioning the matter."); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)

(It remains the Court's "prerogative alone to overrule one of its precedents."); *see also Hohn v. United States*, 524 U.S. 236, 252-253 (1998) (reiterating that prior decisions remain binding precedent until specifically reconsidered).

Instead, it appears the circuit court took guidance from this Court's decision in *Shinseki v. Sanders*, 129 S.Ct. 1696 (2009), which found that the Federal Circuit's harmless error analysis conflicted with established law and that the special nature of the veterans system did not merit unique treatment in applying harmless error rules. *Sanders*, 129 S.Ct. at 1707. The *Henderson* majority concluded by stating, "We complete our analysis with *Sanders* in mind . . . we must be wary of hinging different procedural frameworks solely on the special nature" of the veterans system. *Henderson*, 589 F.3d at 1220.

This reliance on *Sanders* was misplaced. Prior decisions finding equitable tolling applied to veterans cases were not grounded in the special nature of the veterans claims system; they were firmly grounded in this Court's *Irwin* precedent. *Bailey*, 160 F.3d 1363. Neither *Sanders* nor *Bowles* changed any relevant element of the prior analysis, and the Federal Circuit erred in causing upheaval where none was required.

C. Congress Has Not Changed 38 U.S.C. § 7266 to Prohibit Equitable Tolling.

Ever since this Court's decision in *Irwin* and the Federal Circuit's decision in *Bailey*, Congress has taken no action that would indicate dissatisfaction with equitable tolling being available to veterans. In fact, § 7266(a) remains largely unchanged since *Bailey*. The predecessor statute was passed as part of the Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4116 (Nov. 18, 1988) (VJRA). *Irwin* was decided in 1990; Congress amended the statute in 1994. Veterans Benefits Improvement Act of 1994, Pub. L. No. 103-446, 108 Stat. 4670 (Nov. 2, 1994). *Bailey* was decided on November 8, 1998, and Congress amended 38 U.S.C. § 7266 on November 11, 1998. Veterans Programs Enhancements Act of 1998, Pub. L. No. 105-368, 111 Stat. 3315 (Nov. 11, 1998). Congress last amended § 7266 in 2001, repealing a provision that had required a veteran to serve a notice of appeal on the VA. Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 (Dec. 27, 2001).

When Congress amended § 7266(a) in 1994, it is presumed to have done so with full knowledge of *Irwin's* settled holding that equitable tolling is available in suits against the federal government. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well"); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). When Congress again amended the section

in November 1998 and December 2001, it is presumed to have been fully aware of both *Irwin* and *Bailey*. Yet, no change was made that would indicate Congress wished to restrict the results of *Bailey* or otherwise limit the availability of equitable tolling to veterans, and the only reasonable conclusion is that Congress authorized the use of equitable tolling under § 7266(a). *Compare Bailey*, 160 F.3d at 1365, *with United States v. Brockamp*, 519 U.S. 347, 350 (1997) (*Irwin* presumption can be rebutted if there is a "good reason" to believe Congress did not want equitable tolling to apply.)

III. CONGRESS CREATED THE COURT OF APPEALS FOR VETERANS CLAIMS TO PROVIDE JUDICIAL REVIEW OF VETERANS APPEALS FROM THE VA ADJUDICATION PROCESS AND DID NOT MAKE 38 U.S.C. § 7266 JURISDICTIONAL.

Bowles has been cited in several decisions by this Court, mainly for the proposition that only Congress may determine a court's jurisdiction. *See, e.g., Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. Of Adjustment, Central Region*, 130 S.Ct. 584, 558 U.S. __ (2009). In the *Union Pacific* case, the Court began by noting:

> [T]here is surely a starting presumption that when jurisdiction is conferred, a court may not decline to exercise it. *See* R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1061-1062 (6th ed. 2009). The

> general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies."

Union Pacific, 130 S.Ct. at 590.

Congress created the Court of Appeals for Veterans Claims as an Article I court with the sole purpose of providing judicial review where it had previously been forbidden, and the situations where the court may "decline to exercise" that jurisdiction should be few and clearly defined. *See generally*, VJRA. In creating the Court of Appeals for Veterans Claims and the circumstances under which veterans may obtain judicial review, Congress created no impediment so severe as that now imposed by the Federal Circuit. Rather, given the history preceding the VJRA, the opposite should be presumed: Congress intended to confer jurisdiction to consider the particular controversies of veterans who had been denied by the agency.

There is no dispute that a claimant must establish jurisdiction in the Court of Appeals for Veterans Claims. *See Bethea v. Derwinski*, 2 Vet.App. 252, 255 (1992) (*citing McNutt v. GMAC*, 298 U.S. 178, 181 (1936)). The court must have an orderly way to conduct its business. But, the court must also undertake the case-by-case analysis required when something goes awry in a veteran's attempt to gain entrance through the courthouse doors. As *Irwin v. Shinseki*, *Rickett*, and other recent similar cases demonstrate, problems continue to exist; veterans are sometimes confused about the best way to preserve their appeal rights, and they turn to the VA – which had been helping them process their claims – for assistance.

Now, however, that confusion may be fatal to their claims. The burden imposed by *Henderson* presupposes knowledge that many veterans simply do not have. Most veterans do not retain counsel at the agency; most are still pro se upon filing with the Court of Appeals for Veterans Claims. *See* U.S. Court of Appeals for Veterans Claims Annual Reports, *available at http://www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf* (showing pro se rates have ranged from 53% to 70% at the time of filing over ten years). Veterans are at a disadvantage when bringing suit against the government, and this Court has interpreted timing provisions to protect claimants who may be at a disadvantage in litigation. *See, e.g., Bowen v. City of New York*, 476 U.S. 467, 478-80 (1986) (finding "compelling" reasons for equitable tolling where the Social Security Administration had a secret policy to deny the claims of mentally disabled applicants).

While *Henderson* further disadvantages veterans, no harm or disadvantage comes to either VA or the lower court, with or without equitable tolling. The Federal Circuit had reached the same conclusion in an earlier decision: "We also observe that: (1) the 120-day period for appeal is relatively short, especially considering that most claimants are not represented by counsel; (2) the government is unlikely to experience prejudice as a result of the delay; and (3) the record has been fully developed." *Barrett*, 363 F.3d at 1320.

There has been no action by Congress, and neither *Bowles* nor *Henderson* provide a compelling reason for veteran appellants to suddenly be treated so differently than they have been since 1998. Instead,

Henderson impedes the implementation of Congress's goal in creating an avenue for veterans to appeal their VA claims. The Court should grant the petition and review Mr. Henderson's case.

CONCLUSION

For the foregoing reasons, in addition to those stated in the petition, the Court should grant the petition.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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DAVID L. HENDERSON,

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v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* UNITED SPINAL ASSOCIATION IN SUPPORT OF PETITIONER DAVID L. HENDERSON

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. CONGRESS INTENDED JUDICIAL REVIEW OF VETERANS CLAIMS TO BE "ACCURATE, INFORMAL, EFFICIENT, AND FAIR" 3

II. THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 7266 FAILS TO ACHIEVE CONGRESS'S GOALS 6

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Arbas v. Nicholson,
403 F.3d 1379 (Fed. Cir. 2005) 9

Bailey v. West,
160 F.3d 1360 (Fed. Cir. 1998) (en banc) 7

Barrett v. Principi,
363 F.3d 1316 (Fed. Cir. 2004) 9

Boone v. Lightner,
319 U.S. 561 (1943) 5

Bowles v. Russell,
551 U.S. 205 (2007) 5

Brown v. Gardner,
513 U.S. 115 (1994). 5

Henderson v. Shinseki,
589 F.3d 1201 (Fed. Cir. 2009) 9

Jaquay v. Principi,
304 F.3d 1276 (Fed. Cir. 2002) (en banc) 7

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 5

Statutes

38 U.S.C. § 7266 ..... *passim*

Other Authorities

H.R. Rep. No. 100-936 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782 ..... 2, 4, 5

James T. O'Reilly, *Burying Caeser: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001) 9

Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361 (2009) 6, 7

Veterans Court Dockets, *available at* https://efiling.vetapp.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp. 8

Veterans Court, Annual Reports (2000-2009), *available at* http://www.uscourts.cavc.gov/annual_report 8, 10

INTEREST OF *AMICUS CURIAE*

United Spinal Association is a nonprofit organization formed in 1946 by paralyzed veterans. It has served in the interests of veterans and their families ever since.[1] Fully recognized by the U.S. Department of Veterans Affairs as a national veterans service organization, United Spinal has several thousand veteran members in its ranks.

The organization's mission is to improve the quality of life of Americans with spinal cord injuries. United Spinal provides services to veterans through its VetsFirst program, in which it provides direct representation and counseling to all veterans, regardless of their membership status or type of disability, as well as to their dependents and survivors. United Spinal also maintains a network of VA-accredited veterans service representatives across the nation to assist veteran claimants for VA benefits in their communities. Further, United Spinal's public policy component advocates on behalf of veterans before Congress and state legislatures.

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[1] Counsel of record for the parties received timely notice of the intent to file this brief. S. Ct. R. 37.2(a). The parties to this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission.

United Spinal has a strong interest in Mr. Henderson's petition for a writ of certiorari. Equitable tolling of 38 U.S.C. § 7266 has provided a vital safeguard for veterans with serious physical and mental disabilities, including disabilities resulting from spinal-cord injuries. Many veterans with spinal-cord injuries will be affected adversely under the Federal Circuit's decision in this case. United Spinal therefore supports Mr. Henderson's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

This case presents an important matter of national interest. Not only does the Federal Circuit's decision overturn years of judicial precedent preserving the pro-claimant system for adjudicating veterans benefits through equitable tolling of the 120-day time limit for commencing action in the Court of Appeals for Veterans Claims ("Veterans Court"). It also undermines Congress's expressly stated goal for judicial involvement in the veterans benefits system to be "[a]ccurate, informal, efficient, and fair." H.R. Rep. No. 100-936 at 26 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5808.

In fact, this case creates a striking appearance of unfairness to vulnerable veteran claimants, all of whom appear before the Veterans Court for the first time outside the nonadversarial agency-level process, and most of whom appear *pro se*. Under the Federal Circuit's decision, a veteran who actively pursues a judicial remedy in the Veterans Court but

files a defective pleading will be denied review. This case also effects an "ironic and inhumane" result on many veterans who are unable to meet section 7266(a)'s filing deadline because of the very disabilities for which they seek benefits.

Finally, the agency's high error rate means that, among the over 200 cases dismissed in the Veterans Court as a result of its own decision in this case, a great many veterans with meritorious claims have been denied review when they were justifiably unable to meet section 7266(a)'s 120-day deadline. The Veterans Court's now-routine dismissals, which continue at a rate of about two per week, will perpetuate the unfairness to veteran claimants. Because the Federal Circuit's interpretation of section 7266 falls short of meeting Congress's goal for the Veterans Court, and has resulted in the dismissal of a high number of meritorious cases among particularly vulnerable veteran claimants, Mr. Henderson's petition for a writ of certiorari should be granted. United Spinal therefore supports his petition.

ARGUMENT

I. CONGRESS INTENDED JUDICIAL REVIEW OF VETERANS CLAIMS TO BE "ACCURATE, INFORMAL, EFFICIENT, AND FAIR"

"Accurate, informal, efficient, and fair." Those were the goals that guided Congress in establishing

the Veterans Court under the Veterans Judicial Review Act. H.R. Rep. No. 100-936 at 26 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5808. Members of Congress understood that the Act marked a shift in responsibility within the federal government for ensuring the fair treatment of veterans. "[A]chievement of these goals is no longer solely the function of the executive branch, with an occasional nudge from the Congress. By allowing courts to review VA policy, the Congress is entrusting the courts with an important responsibility." *Id.*

As noted in the legislative history of the Act, veterans service organizations had been advocating since at least 1960 for the judiciary to be entrusted with responsibility for reviewing adverse decisions of the Board of Veterans' Appeals ("Board"). A primary concern of the service organizations was that the Board "gave scant attention to appeals." *Id.* at 5792. Judicial review was thus viewed as a means of ensuring the accuracy and fairness of the Board's decisions. *See id.* at 5793. Additionally, in endorsing judicial review of the veterans benefits system, the House Committee on Veterans' Affairs trusted that courts would not overly formalize the veterans benefits system:

> If as a result of the enactment of this legislation, the perception of the VA system is that it has become inefficient, formalized, and unfair, and accuracy in decision-making becomes a fortuitous

> event rather than a consistent one, veterans will bear the burden of the change. The committee has always been mindful of this possibility, and trusts that courts are no less aware of the vital interests which are at stake.

Id. at 5808.

Moreover, this Court has held that statutes providing "for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hospital*, 502 U.S. 215, 220 n.9 (1991). That canon of construction has been applied to a number of statutes that protect the interests of veterans. *See, e.g., Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."). And that canon has been applied to Title 38. *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994).

The Federal Circuit, however, ignored that canon in interpreting 38 U.S.C. § 7266(a) based on a flawed reading of a non-veterans case: *Bowles v. Russell*, 551 U.S. 205 (2007). But as Mr. Henderson argues, *Bowles* addressed a court-to-court appeal, not a veteran's commencement of a judicial challenge to an adverse agency decision. *See* Petition for a Writ of Certiorari, at 26-32. By placing sole reliance on that decision, the Federal Circuit reached an interpretation of section 7266(a) that is contrary this

Court's precedent, as well as Congress's goals in providing for judicial review of veterans claims that is "[a]ccurate, informal, efficient, and fair." For the reasons discussed below, the Federal Circuit's decision in this case is also manifestly unfair and unjust to precisely those veterans Congress and this Court have sought to protect.

II. THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 7266 FAILS TO ACHIEVE CONGRESS'S GOALS

First, initiating proceedings before the Veterans Court under section 7266(a) is the first step for claimants outside the nonadversarial agency-level process. As Mr. Henderson argues, that feature of the statute indicates that it is a statute of limitations for initiating a judicial challenge to a Board decision. *See* Petition for a Writ of Certiorari, at 19-22. Professor Michael Allen has observed that initiating a challenge in the Veterans Court can be a pitfall for veterans: "Whatever the reality is, there has been, and remains, a tension between the agency-level process and the unquestionably traditional adversarial process at the Veterans Court and beyond. In a sense, veterans transitioning from one system to another have the potential to be caught unaware of new rules and other formalities." Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361, 379 (2009) (footnote omitted). The agency-level process is designed to

assist veterans and other claimants, and they reasonably rely on that assistance, even after they have received an adverse agency decision and seek judicial review before the Veterans Court. But the VA does not always provide claimants with correct advice for appealing adverse Board decisions. Indeed, claimants relying on incorrect advice from Regional Offices have misfiled their challenges to adverse Board decisions. *See Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (en banc) ("[Bailey's] reliance on, and faith in what Congress clearly intended to be a paternalistic means for addressing veterans' claims, presumably lulled him into accepting and relying upon the advice and aid of the government. Given the particular relationship between veterans and the government, Bailey was misled by the conduct of his adversary into allowing the filing deadline to pass." (citation omitted)). Prior to the Federal Circuit's decision in this case, equitable tolling provided a procedural safeguard for those veterans. *Id.*; *Jaquay v. Principi*, 304 F.3d 1276, 1289 (Fed. Cir. 2002) (en banc). Reinstating equitable tolling of section 7266(a) in this case would preserve a measure of fairness for veterans facing "the unquestionably traditional adversarial process at the Veterans Court and beyond." Allen, *supra* at 379.

Second, the majority of claimants are self-represented when they initiate proceedings in the Veterans Court. In 2009, 68% of claimants were self-represented at the time of filing. *See* Veterans Court, Annual Reports (2000-2009), *available at*

http://www.uscourts.cavc.gov/annual_report. That number has increased from 64% in 2008 and 53% in 2007. Self-represented claimants are obviously more vulnerable to the inherent pitfall they face when transitioning from the informal agency-level proceedings to judicial proceedings. Indeed, of the 169 dismissals in 2009 citing the decision in this case, at least 119 were filed by self-represented claimants.[2] For these claimants, that is a particularly frustrating result. As Professor James O'Reilly has observed, "[a] study of veterans' jurisprudence illustrates a pattern of unfairness that allows systematic VA staff delays, but consistently rejects claims by unrepresented veterans who miss deadlines." James T. O'Reilly, *Burying Caeser:*

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[2] *See* Vet. App. Nos. 09-3464; 09-3364; 09-3336; 09-3260; 09-3182; 09-3179; 09-3153; 09-3145; 09-3094; 09-3050; 09-3049; 09-2794; 09-2636; 09-2618; 09-2436; 09-2407; 09-2384; 09-2298; 09-2287; 09-2102; 09-1939; 09-1906; 09-1732; 09-1661; 09-1607; 09-1417; 09-1146; 09-1040; 09-0989; 09-0969; 09-0947; 09-0934; 09-0888; 09-0766; 09-0730; 09-0721; 09-0701; 09-0630; 09-0572; 09-0544; 09-0468; 09-0435; 09-0399; 09-0389; 09-0363; 09-0327; 09-0266; 09-0188; 09-0163; 09-0156; 09-0117; 09-0111; 09-0102; 09-0056; 08-4280; 08-4242; 08-4104; 08-4000; 08-3804; 08-3748; 08-3647; 08-3507; 08-3490; 08-3486; 08-3482; 08-3445; 08-3406; 08-3399; 08-3398; 08-3385; 08-3382; 08-3364; 08-3356; 08-3322; 08-3142; 08-3112; 08-3044; 08-3011; 08-2993; 08-2933; 08-2922; 08-2909; 08-2807; 08-2756; 08-2709; 08-2700; 08-2689; 08-2661; 08-2630; 08-2535; 08-2506; 08-2232; 08-2221; 08-1202; 08-0904; 08-0613; 08-0463; 08-0356; 08-0069; 07-3819; 07-3581; 07-3525; 07-3389; 07-3168; 07-3033; 07-3013; 07-2937; 07-2652; 07-1797; 07-1728; 07-1609; 07-1594; 07-1175; 07-1041; 07-0827; 07-0782; 07-0653; 06-3271; 06-2574. Veterans Court dockets are available at https://efiling.vetapp.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp.

Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants, 53 ADMIN. L. REV. 223, 234 (2001).

Third, many veterans are unable to meet the 120-day deadline as a result of disabilities *for which they seek benefits*. Before abolishing equitable tolling, the Federal Circuit had held that section 7266(a) could be tolled for late filings that resulted from mental illness, *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004), or physical illness, *Arbas v. Nicholson*, 403 F.3d 1379, 1382 (Fed. Cir. 2005). The court reached those results by construing section 7266(a) in a common-sense manner. According to the court, "[i]t would be both ironic and inhumane to rigidly implement section 7266(a) because the condition preventing a veteran from timely filing is often the same illness for which compensation is sought." *Barrett*, 363 F.3d at 1320; *see also*, *Henderson v. Shinseki*, 589 F.3d 1201, 1221 (Fed. Cir. 2009) (Mayer, J., dissenting).

Fourth, the Board's decisions are frequently incorrect as measured by the results of the appealed decisions. From 2000 to 2009, the Veterans Court has reversed or remanded Board decisions in an average of 1,762 cases per year, while affirming an average of only 403 cases per year. *See* Veterans Court, Annual Reports (2000-2009). The result of the Federal Circuit's interpretation of section 7266(a) is that many veterans who challenge wrongly decided Board decisions will not be heard even though their filings are justifiably late under a

theory of equitable tolling. This result is clearly contrary to Congress's goals for an "[a]ccurate" and "fair" system of judicial review of agency decisions. At a minimum, Mr. Henderson and other veterans should be granted review in this Court to ensure that judicial review of the veterans benefits system maintains at least an appearance of fairness.

CONCLUSION

For these reasons, United Spinal respectfully requests that the Court grant Mr. Henderson's petition for a writ of certiorari.

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	14
ARGUMENT	17
I. ALL INDICIA OF CONGRESSIONAL INTENT CONFIRM THAT SECTION 7266(a) IS NOT JURISDICTIONAL	17
A. The Statutory Text Refutes A Jurisdictional Reading	18
B. The Statutory Structure Refutes A Jurisdictional Reading	21
C. The Statutory History And Purposes Refute A Jurisdictional Reading	23
D. The Pro-Veteran Canon Of Statutory Construction Removes Any Doubt As To Congressional Intent	29
II. THE TIME LIMIT TO SEEK JUDICIAL REVIEW IN A CLOSELY ANALOGOUS DISABILITY CONTEXT IS NOT JURISDICTIONAL	30
A. The Time Limit To Seek Judicial Review Of Social Security Benefit Denials Is Not Jurisdictional	30

TABLE OF CONTENTS—Continued

Page

B. The Social Security And Veterans' Disability Contexts Are Indistinguishable In The Relevant Respects... 32

III. *BOWLES* IS INAPPOSITE IN THE VETERANS CONTEXT..... 34

A. Unlike The Statute In *Bowles*, Section 7266(a) Speaks To The Obligation Of A Litigant, Not The Power Of The Court..... 36

B. There Is No Settled Tradition Of Treating Time Limits In The Veterans Context As Jurisdictional..... 37

C. The Veterans Context Fundamentally Differs From The Court-to-Court Context Of *Bowles*..... 39

D. The Appellate Review Performed By The Veterans Court Does Not Mean That The Time Limit Is Jurisdictional..... 44

IV. THE GOVERNMENT'S RELIANCE ON OTHER DISSIMILAR CONTEXTS IS MISPLACED..... 49

A. The Immigration Context Is Inapposite..... 49

B. The Hobbs Act Context Is Inapposite. 51

CONCLUSION..... 52

TABLE OF AUTHORITIES

CASES Page

Allen v. Shinseki,
No. 06-2574, 2009 WL 1424093
(Vet. App. May 22, 2009) 25

Arbas v. Nicholson,
403 F.3d 1379 (Fed. Cir. 2005) 28

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 17, 19, 21, 37

Bailey v. Principi,
351 F.3d 1381 (Fed. Cir. 2003) 28

Bailey v. West,
160 F.3d 1360 (Fed. Cir. 1998) (en banc) ...*passim*

Barber v. Thomas,
130 S. Ct. 2499 (2010) 46

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 21

Barrett v. Principi,
363 F.3d 1316 (Fed. Cir. 2004) 9, 28

Batten v. Shinseki,
No. 09-1158, 2009 WL 3236275
(Vet. App. Oct. 9, 2009) 25

Boone v. Lightner,
319 U.S. 561 (1943) 2

Bove v. Shinseki,
No. 08-1468, 2010 WL 318524
(Vet. App. Jan. 28, 2010) 25

Bowen v. City of New York,
476 U.S. 467 (1986) ..... *passim*

Bowles v. Russell,
551 U.S. 205 (2007) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Brandenburg v. Principi,
371 F.3d 1362 (Fed. Cir. 2004) 28

Brown v. Gardner,
513 U.S. 115 (1994) 15, 30

Comm'r of Internal Revenue v. Bollinger,
485 U.S. 340 (1988) 35

Deal v. United States,
508 U.S. 129 (1993) 45

DiBlasi v. Comm'r of Social Security,
660 F. Supp. 2d 401 (N.D.N.Y. 2009) 47

Doctors Nursing & Rehab. Ctr. v. Sebelius,
--- F.3d ---, 2010 WL 2788564
(7th Cir. July 16, 2010) 48

Dolan v. U.S. Postal Serv.,
546 U.S. 481 (2006) 17

Dolan v. United States,
130 S. Ct. 2533 (2010) 37

Edelman v. Lynchburg College,
535 U.S. 106 (2002) 26

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 17

Forest Grove Sch. Dist. v. T.A.,
129 S. Ct. 2484 (2009) 15, 28

Foti v. INS,
375 U.S. 217 (1963) 50-51

Henderson v. Peake,
22 Vet. App. 217 (2008) 10

TABLE OF AUTHORITIES—Continued

Page

Holland v. Florida,
130 S. Ct. 2549 (2010) 18

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) 18

Irwin v. Shinseki,
23 Vet. App. 128 (2009) 25

Jaquay v. Principi,
304 F.3d 1276 (Fed. Cir. 2002) (en banc) ... *passim*

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 37-38

Johnson v. United States,
130 S. Ct. 1265 (2010) 45

Jones v. Peake,
22 Vet. App. 247 (2008) 25

King v. St. Vincent Hosp.,
502 U.S. 215 (1991) 29

Kontrick v. Ryan,
540 U.S. 443 (2004) 17

Landgraf v. USI Films Prods.,
511 U.S. 244 (1994) 20

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 22-23

Mapu v. Nicholson,
397 F.3d 1375 (Fed. Cir. 2005) 28

McCartey v. Massanari,
298 F.3d 1072 (9th Cir. 2002) 32

Missouri v. Jenkins,
495 U.S. 33 (1990) 49

TABLE OF AUTHORITIES—Continued

Page

Nevada v. Hicks,
533 U.S. 353 (2001) 35

Norman v. Shinseki,
No. 08-0228, 2010 WL 1710732
(Vet. App. Apr. 28, 2010) 25

Percy v. Shinseki,
23 Vet. App. 37 (2009) 45

Porter v. McCollum,
130 S. Ct. 447 (2009) (per curiam) 2-3

Posey v. Shinseki,
23 Vet. App. 406 (2010) 25

Reed Elsevier, Inc. v. Muchnick,
130 S. Ct. 1237 (2010) ..... *passim*

Rockwell Int'l Corp. v. United States,
549 U.S. 457 (2007) 20

Santana-Venegas v. Principi,
314 F.3d 1293 (Fed. Cir. 2002) 28

Scarborough v. Principi,
541 U.S. 401 (2004) 22

Shinseki v. Sanders,
129 S. Ct. 1696 (2009) 30

Sims v. Apfel,
530 U.S. 103 (2000) 16, 33, 40, 47

Snyder v. Barnhart,
212 F. Supp. 2d 172 (W.D.N.Y. 2002) 47-48

Stone v. INS,
514 U.S. 386 (1995) 16, 49, 50

TABLE OF AUTHORITIES—Continued

Page

Torres v. Barnhart,
417 F.3d 276 (2d Cir. 2005) 47

Traylor v. Astrue,
668 F. Supp. 2d 624 (D. Del. 2009)..... 47

Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs,
130 S. Ct. 584 (2009)..... 37

United States v. Comprehensive Drug Testing, Inc.,
513 F.3d 1085 (9th Cir. 2008)..... 39

Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305 (1985).....*passim*

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982).....14, 19, 21, 26

STATUTES, REGULATIONS, AND RULES

8 U.S.C. § 1229 50

17 U.S.C. § 411 20

28 U.S.C. § 46 43

28 U.S.C. § 1254 2

28 U.S.C. § 1292 42

28 U.S.C. § 2107 .....*passim*

28 U.S.C. § 2342 51

28 U.S.C. § 2344 51

28 U.S.C. § 2412 8

31 U.S.C. § 3730 20

TABLE OF AUTHORITIES—Continued

	Page
38 U.S.C. § 211 (1982)	7
38 U.S.C. § 511	7
38 U.S.C. § 1110	4
38 U.S.C. § 1131	4
38 U.S.C. § 3404 (1988)	6
38 U.S.C. § 5101	4, 5
38 U.S.C. § 5103A	5, 24, 41
38 U.S.C. § 5104	5
38 U.S.C. § 5107	5, 24
38 U.S.C. § 5904	6
38 U.S.C. § 7101	5, 41, 42
38 U.S.C. § 7101A	42
38 U.S.C. § 7102	6
38 U.S.C. § 7104	*passim*
38 U.S.C. § 7105	5-6, 45, 46
38 U.S.C. § 7106	45
38 U.S.C. § 7107	41, 45
38 U.S.C. § 7108	45
38 U.S.C. § 7251	7
38 U.S.C. § 7252	*passim*
38 U.S.C. § 7254	43
38 U.S.C. § 7261	22, 23
38 U.S.C. § 7262	22

TABLE OF AUTHORITIES—Continued

Page

38 U.S.C. § 7263 ..... 7-8, 22

38 U.S.C. § 7264 22

38 U.S.C. § 7265 22

38 U.S.C. § 7266 ..... *passim*

38 U.S.C. § 7267 22

38 U.S.C. § 7268 22

38 U.S.C. § 7269 22

38 U.S.C. § 7292 ..... 2, 8, 42, 46

42 U.S.C. § 405 ..... 31, 32, 33, 48

42 U.S.C. § 2000e 19

42 U.S.C. § 2000e-5 19

Administrative Orders Review Act of 1950 (Hobbs Act), ch. 1189, 64 Stat. 1129 ..... 16, 51

Judiciary Act of 1789, ch. 20, 1 Stat. 73 43

Pub. L. No. 109-461, 120 Stat. 3403 (2006) ... 6

Veterans Benefits Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820 29

Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145 29

Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 29

Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) 7, 23

TABLE OF AUTHORITIES—Continued

Page

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38 C.F.R. § 3.103 ..... 5, 24, 41

38 C.F.R. § 19.35 6

38 C.F.R. § 20.700 ..... 6, 7, 24, 41

Fed. R. App. P. 4 ..... 8, 34

Fed. R. App. P. 26 49-50

OTHER MATERIALS

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Black's Law Dictionary 1546 (9th ed. 2009) .. 19

Brief for the United States as Amicus Curiae, *Reed Elsevier*, 130 S. Ct. 1237 (No. 08-103) 20, 21, 36

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H.R. Rep. No. 100-963 (1988) 4, 23, 24, 41

President Barack Obama, Remarks in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010) 3

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Page

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Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 Admin. L. Rev. 731 (2003) 43, 47

IN THE

Supreme Court of the United States

No. 09-1036

DAVID L. HENDERSON,
Petitioner,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 589 F.3d 1201. Pet. App. 1a-73a. The opinion of the Court of Appeals for Veterans Claims ("Veterans Court") dismissing the case for lack of jurisdiction is reported at 22 Vet. App. 217. Pet. App. 74a-92a. The decision of the Board of Veterans' Appeals ("Board") denying petitioner's claim for disability benefits is unreported. *Id.* at 103a-17a.

JURISDICTION

The court of appeals entered judgment on December 17, 2009. The petition for a writ of certiorari was filed on February 24, 2010, and granted on June 28,

2010. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* 38 U.S.C. § 7292(c).

STATUTORY PROVISIONS INVOLVED

The statutory provision conferring the jurisdiction of the Veterans Court, 38 U.S.C. § 7252(a), states:

> The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

The statutory provision setting forth the time limit for a veteran to seek judicial review in the Veterans Court, 38 U.S.C. § 7266(a), states:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

STATEMENT OF THE CASE

This Nation has always provided care for veterans "who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Congress has passed legislation providing benefits to disabled veterans "after every conflict in which the Nation has been involved." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985); *cf. Porter v. McCollum*, 130 S. Ct. 447, 455 (2009) (per curiam)

(noting the Nation's "long tradition of according leniency to veterans in recognition of their service").

The overriding purpose of the laws providing veterans' benefits is, in the words of Abraham Lincoln, "to care for him who shall have borne the battle and for his widow, and his orphan." U.S. Dep't of Veterans Affairs, The Origin of the VA Motto 1; *accord Walters*, 473 U.S. at 309 (quoting same). As the President recently reminded the Nation, "making sure that we honor our commitments to those who have served our country . . . is a sacred trust." President Barack Obama, Remarks in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010).

Today, almost 4 million veterans and their dependents receive benefits from the Department of Veterans Affairs ("VA"). U.S. Dep't of Veterans Affairs, FY 2009 Performance and Accountability Report, Executive Summary I-3 (2009). After nearly a decade of conflict in Iraq and Afghanistan, 5,667 U.S. troops have died, and 39,749 have been wounded in action. U.S. Dep't of Defense, U.S. Casualty Status Report (Sept. 7, 2010), *available at* http://www.defense.gov/news/casualty.pdf. Those wounded soldiers will turn to the VA to provide care for them and their families. Yet experience shows that the VA has improperly denied disability benefits to far too many veterans. Those who are able to navigate the labyrinth of VA processes and obtain judicial review of the VA's denial of benefits in the Veterans Court prevail in roughly 80 percent of cases decided on the merits. *See* U.S. Court of Appeals for Veterans Claims, 2000-2009 Annual Reports 1 [hereinafter Veterans Ct. Rept.].

This case presents the question whether Congress intended to shut the courthouse doors to veterans who, through no fault of their own, miss the 120-day time limit to seek review of an agency denial of benefits in the Veterans Court. As wounded soldiers arrive home in droves from the current conflicts abroad, the United States successfully urged the court of appeals to hold that the 120-day time limit is "jurisdictional" and thus bars equitable tolling under any circumstances.

The circumstances here involve a severely disabled veteran of the Korean conflict. After waiting more than three years for the VA to rule on his disability benefits claim, the petitioner missed the 120-day deadline by 15 days because he was bedridden from the very disability for which he sought benefits. Congress did not intend to deny any court access to petitioner and countless other veterans who have made untold sacrifices to the Nation.

I. The Veterans' Disability Benefits System

a. *The Non-Adversarial Administrative Process.* Veterans who served on active duty in the United States military are entitled to receive benefits for disabilities caused or aggravated by their military service. 38 U.S.C. §§ 1110, 1131. The Department of Veterans Affairs administers the federal program for providing disability benefits to veterans. *Id.* § 5101(a).

Congress designed the VA administrative process as a "non-adversarial" and "completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963, at 13 (1988). Accor-

dingly, unlike an adversarial court proceeding, "no Government official appears in opposition" to the veteran throughout the administrative process. *Walters*, 473 U.S. at 309-11; *see also* 38 C.F.R. § 3.103(a) ("Proceedings before VA are ex parte in nature.").

Congress also imposed on the VA an affirmative "duty to assist" the veteran in developing his or her claim within the agency. 38 U.S.C. § 5103A. Congress intended the system to be pro-veteran such that, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the [VA] shall give the benefit of the doubt to the claimant." *Id.* § 5107(b).

A veteran seeking benefits for a service-connected disability begins the administrative process by filing an application at one of over fifty VA regional offices. *See id.* § 5101(a). The VA regional office must notify the veteran "on a timely basis" of the VA's initial decision whether to provide disability benefits. *Id.* § 5104(a).

If the VA regional office denies benefits, the veteran may "appeal" to the Board of Veterans' Appeals. *Id.* § 7104(a). The Board is an administrative body within the VA that is directly accountable to the Secretary of Veterans Affairs ("Secretary"). *See id.* §§ 7101(a), 7104(c).

To appeal to the Board, the veteran first must file a "notice of disagreement" at the VA regional office within one year after the initial denial of benefits. *Id.* § 7105(b)(1). After receiving a notice of disagreement, the regional office must prepare a "statement of the case" describing the basis for its decision

denying benefits. *Id.* § 7105(d)(1). After the regional office completes the statement of the case, the veteran has sixty days to file at the regional office a "substantive appeal," *id.* § 7105(a), (d)(3), which the regional office certifies and forwards to the Board. 38 C.F.R. § 19.35.

Proceedings before the Board, like those at the VA regional office, are "ex parte in nature and nonadversarial." *Id.* § 20.700(c). A veteran who appeals a regional office's denial of benefits may have an optional "informal" hearing, by phone or in a conference room, concerning his or her claim. U.S. Dep't of Veterans Affairs, How Do I Appeal?, VA Pamphlet 01-02-02A (Apr. 2002), at 9 [hereinafter VA Appeal Pamphlet]. The Board then issues the final decision of the agency on whether to provide the veteran disability benefits. 38 U.S.C. §§ 7102(a), 7104(a).

Until 2006, veterans were substantially restricted from obtaining legal representation at any stage of the administrative process. 38 U.S.C. § 3404(c) (1988) (current version as amended at 38 U.S.C. § 5904); *Walters*, 473 U.S. at 307-08. Congress relaxed this restriction in 2006 to permit a veteran to retain counsel after he or she files a notice of disagreement seeking review by the Board of an adverse initial decision of the VA regional office. Pub. L. No. 109-461, § 101(c)(1), 120 Stat. 3403, 3407 (2006) (codified at 38 U.S.C. § 5904(c)(1)). Nevertheless, the vast majority of veterans today proceed before the Board, as they do at the VA regional office, unrepresented by counsel. *See* U.S. Dep't of Veterans Affairs, Fiscal Year 2009 Report of the Chairman, Board of Veterans' Appeals 21 [hereinafter 2009 Board Rept.].

b. *Judicial Review In The Veterans Court.* For decades, veterans were precluded from obtaining judicial review of Board decisions. 38 U.S.C. § 211(a) (1982) ("no . . . court of the United States shall have power or jurisdiction to review any [VA benefits determination]") (current version as amended at 38 U.S.C. § 511). In 1988, Congress enacted the Veterans' Judicial Review Act, which for the first time authorized courts to consider the claims of veterans seeking disability benefits. Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.).

Congress established a right to judicial review "to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled." S. Rep. No. 100-418, at 29 (1988). Congress also sought to address the perception among veterans that—because of the restrictions on legal representation and judicial review—"they ha[d] been denied their 'day in court.'" *Id.* at 31.

The 1988 Act created the Court of Appeals for Veterans Claims, an Article I legislative court. 38 U.S.C. § 7251. The Veterans Court has "exclusive jurisdiction to review decisions of the Board" and has the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." *Id.* § 7252(a).

To initiate suit, the veteran must file "a notice of appeal" at the Veterans Court within 120 days after the Board's decision denying benefits. *Id.* § 7266(a). This is the first time a veteran seeking benefits becomes adverse to the Secretary. *Compare* 38 C.F.R. § 20.700(c) (Board proceeding is "ex parte in nature and nonadversarial") *with* 38 U.S.C. § 7263(a)

(Secretary is represented in Veterans Court by VA General Counsel).

As with the administrative process, most veterans—between 53 and 70 percent annually since 2000—initiate proceedings before the Veterans Court without legal representation. Veterans Ct. Rept., *supra*, at 1. When the Veterans Court decides cases on the merits, the veteran prevails in roughly 80 percent of cases. *Id.* In the last two years, the Veterans Court has awarded attorneys' fees to the veteran in more than 50 percent of cases because the government's position was not "substantially justified" under 28 U.S.C. § 2412(d)(1)(A). Veterans Ct. Rept., *supra*, at 1.

c. *Appellate Review In The Federal Circuit.* The United States Court of Appeals for the Federal Circuit has "exclusive jurisdiction to review" decisions of the Veterans Court. 38 U.S.C. § 7292(c). The veteran must file "a notice of appeal with the [Veterans Court] within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts." *Id.* § 7292(a). Thus, as with appeals from a federal district court to a circuit court of appeals, the veteran must file the notice of appeal within 30 days after entry of the Veterans Court's judgment. *See* Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2107(a). The veteran may appeal the Federal Circuit's decision to this Court "upon certiorari." 38 U.S.C. § 7292(c).

II. Proceedings Below

a. Petitioner David L. Henderson joined the military in 1950, the year the United States entered the Korean conflict. Pet. App. 3a. He was discharged while on active duty in 1952 after being diagnosed

with paranoid schizophrenia "for which he has established service connection and currently has a 100% disability rating." *Id.*

In August 2001, petitioner, unrepresented by counsel, applied to a VA regional office for monthly compensation for in-home care. The regional office denied petitioner's claim, and he appealed to the Board. On August 30, 2004, the Board denied petitioner's claim. *Id.*

b. On January 12, 2005, petitioner filed a *pro se* notice of appeal in the Veterans Court. *Id.* Petitioner's notice was filed 15 days after the expiration of the 120-day time limit under 38 U.S.C. § 7266(a). Pet. App. 3a. The Veterans Court ordered petitioner to show cause why his case should not be dismissed as untimely. *Id.* at 4a. Petitioner asked the Veterans Court to excuse his 15-day late filing because the disability for which he sought benefits—his paranoid schizophrenia which rendered him incapable of rational thought—prevented him from timely filing suit. *Id.*

At that time, the Federal Circuit repeatedly had held that Section 7266(a)'s time limit was a "120-day statute of limitations" subject to equitable tolling. *Jaquay v. Principi*, 304 F.3d 1276, 1284 (Fed. Cir. 2002) (en banc); *accord, e.g.*, *Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc). The Federal Circuit also had held that a veteran's mental illness may equitably toll the 120-day time limit. *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004).

In March 2006, the Veterans Court in a single-judge order dismissed petitioner's case. The judge found that petitioner's "mental illness and medical impairments rendered him incapable of rational

thought or deliberate decision making and unable to handle his own affairs or function in society." Pet. App. 101a. The judge nonetheless refused to equitably toll the 120-day time limit on the ground that petitioner did not show his medical condition had directly caused the delay. *Id.*

Soon thereafter, pro bono counsel entered an appearance to represent petitioner and moved for reconsideration of the single-judge order.[1] In October 2006, the Veterans Court granted the motion, revoked the single-judge order, and assigned the matter to a panel for decision. *Id.* at 97a.

While the case was pending, this Court in *Bowles v. Russell*, 551 U.S. 205 (2007), held that the time limits set forth in 28 U.S.C. § 2107 are jurisdictional. The Veterans Court directed the parties to submit supplemental memoranda addressing the effect of *Bowles* on the Federal Circuit's previous decisions allowing equitable tolling under 38 U.S.C. § 7266(a). Pet. App. 94a.

In July 2008, a divided panel of the Veterans Court dismissed the case for lack of jurisdiction. *Id.* at 74a-83a. The majority concluded that under *Bowles*, Section 7266(a)'s 120-day time limit is jurisdictional and thus not subject to equitable tolling. *Id.* at 76a-82a. The majority recognized, however, that "even after *Bowles*, because an appeal to [the Veterans] Court is the first opportunity for an appellant to have his claim considered by a judicial body that is

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[1] The Veterans Consortium Pro Bono Program (http://www.vetsprobono.org) identified the case and referred it to Arnold & Porter LLP. *See* Pet. App. 4a, 43a n.12; Dkt. entries 03/24/06-10/31/06, Henderson v. Peake, 22 Vet. App. 217 (2008) (No. 05-0090).

independent of the executive agency deciding his claim, one might be tempted to analogize the period provided to file such an appeal to a statute of limitations." *Id.* at 82a.

Judge Schoelen dissented. *Id.* at 84a-92a. Given the overwhelmingly benevolent statutory framework, the dissent rhetorically asked, "did Congress truly intend for this Court's jurisdiction to be limited by a temporal restriction in the face of extraordinary circumstances, in the same way that the Article III courts of appeals' jurisdiction is limited?" *Id.* at 91a.

c. Following argument before a panel of the Court of Appeals for the Federal Circuit, the court of appeals *sua sponte* ordered rehearing en banc "to determine whether, in light of *Bowles*, [the court] should overrule *Bailey* and *Jaquay*." *Id.* at 2a. On December 17, 2009, a divided court answered that question in the affirmative, overturned *Bailey* and *Jaquay*, and affirmed the dismissal of petitioner's suit for lack of jurisdiction. *Id.* at 1a-43a.

The majority relied on this Court's statement in *Bowles* that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.* at 25a (quoting *Bowles*, 551 U.S. at 214). Because "§ 7266(a) is a notice of appeal, or time of review, provision in a civil case," the majority reasoned that the provision necessarily is jurisdictional. *Id.*

The majority acknowledged "that Mr. Henderson's appeal to the Veterans Court represented the first time he could appear before a court." *Id.* at 26a. The court nonetheless concluded that the 120-day time limit was not a statute of limitations because proceedings before the Veterans Court share "characteristics of appellate review." *Id.* at 27a. The

majority pointed to Section 7266(a)'s title, "Notice of Appeal," and the fact that the veteran files a "*notice of appeal*" to obtain "*review*" of the agency's denial of benefits. *Id.* at 26a-27a (quoting 38 U.S.C. § 7266(a) (emphasis added by court of appeals)).

Judge Dyk, joined by Judges Gajarsa and Moore, concurred, expressing the view that "the rigid deadline of the existing statute can and does lead to unfairness . . . particularly so in the many cases where the veteran is not represented by counsel during the processing of the claim at the Veterans Administration and/or is suffering from a mental disability." *Id.* at 44a.

Judge Mayer, joined by Chief Judge Michel and Judge Newman, vigorously dissented. *Id.* at 46a-73a. The dissent found that "the majority's eradication of equitable tolling before the [Veterans Court] creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." *Id.* at 46a. The dissent explained that "the veteran who incurs the most devastating service-connected injury . . . will often be the least able to comply with rigidly enforced filing deadlines." *Id.* "Under the majority's approach, this veteran will be both 'out of luck and out of court.'" *Id.* at 46a-47a. The dissent called that approach "indefensible" and a "heavy blow" that would "prove calamitous for many severely disabled veterans." *Id.* at 68a, 70a, 71a.

The dissent also criticized the majority for improperly "seiz[ing] upon" a single sentence in *Bowles* to set forth the governing framework. *Id.* at 49a. "When read in context . . . this statement means only that the appellate filing deadline set by . . . 28 U.S.C. § 2107(a) is jurisdictional in nature" and "does not

speak to the separate issue of whether equitable tolling applies to judicial review of agency decisions." *Id.* at 49a-50a. The dissent noted that this Court in *Bowen v. City of New York*, 476 U.S. 467, 480-81 (1986), had "made clear that time limits for seeking initial court review of adverse agency actions are generally classified as statutes of limitations rather than jurisdictional bars." Pet. App. 52a.

The dissent also explained that the "statute at issue in *Bowles* contains an express limit on the power of Article III courts to hear appeals . . . . In contrast, section 7266(a) is not framed as an express limit on the authority of the reviewing tribunal, but instead speaks only to the actions a veteran must take to bring his claim." *Id.* at 59a.

The dissent further reasoned that the legislative backdrop confirmed Congress did not intend to rank the 120-day time limit as jurisdictional. "When it established the Veterans Court, Congress made clear that proceedings before the court were not to be overly 'formalized,' but instead were to be '[a]ccurate, informal, efficient, and fair.'" *Id.* at 68a (quoting H.R. Rep. No. 100-963, at 26). In addition, "[b]ecause so many veterans must file their petitions without the assistance of counsel, it is highly unlikely that Congress intended for section 7266(a) to serve as a harsh and inflexible jurisdictional bar." *Id.* at 69a. Rather, the dissent noted that Congress repeatedly amended the governing statutes after the Federal Circuit had held that Section 7266(a) was subject to equitable tolling, yet "Congress chose not to disturb established equitable tolling jurisprudence." *Id.* at 69a-70a.

SUMMARY OF ARGUMENT

I. All indicia of congressional intent confirm that Section 7266(a) does not limit the jurisdiction of the Veterans Court.

First, the plain language of Section 7266(a) refutes that Congress intended the 120-day time limit to be a jurisdictional prerequisite to suit. The text does not remotely suggest that the time limit is jurisdictional. Under this Court's decisions, the absence of any textual indication that a provision is jurisdictional is ordinarily dispositive. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244-45 (2010). Indeed, the statutory text confirms a non-jurisdictional reading of Section 7266(a). Congress framed the 120-day time limit as an obligation of the veteran rather than a restriction on the power of the Veterans Court. *See id.* at 1243.

Second, the statutory structure refutes that Congress intended the time limit to be jurisdictional. A separate and distinct provision addresses the jurisdiction of the Veterans Court, 38 U.S.C. § 7252(a), and that provision makes no reference to the 120-day time limit. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). Moreover, Congress placed Section 7266 in a subchapter relating to matters of procedure, while placing the provision that confers jurisdiction on the Veterans Court, Section 7252(a), in the subchapter relating to the court's jurisdiction.

Third, the history and purposes of the statutory scheme refute a jurisdictional reading of Section 7266(a). Congress established judicial review "to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled." S. Rep. No. 100-418, at 29 (1988). The decision below

would ensure just the opposite by barring judicial review to countless disabled veterans with meritorious claims.

The overarching thrust of the veterans' disability scheme, moreover, is decisively pro-veteran. It defies credulity that Congress intended to impose an anti-veteran jurisdictional rule in an otherwise pro-veteran scheme. The court of appeals's decision would foreclose judicial review no matter how equitable the circumstances may have been in preventing the veteran from timely seeking review in the Veterans Court. If Congress had intended such harsh results, it had ample opportunity to overrule the Federal Circuit decisions allowing equitable tolling of the 120-day time limit when Congress repeatedly amended the statute. *See Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009).

Finally, although the above factors alone resolve this case, the pro-veteran canon of statutory construction removes any interpretive doubt. *See Brown v. Gardner*, 513 U.S. 115, 117-18 (1994). The court of appeals's decision forecloses all judicial review to disabled veterans who missed the deadline through no fault of their own. It would turn the pro-veteran canon on its head to conclude that Congress intended to "create[] a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Pet. App. 46a (Mayer, J., dissenting). To the extent there is any doubt as to congressional intent, this Court should not assume Congress intended a result that would "prove calamitous for many severely disabled veterans." *Id.* at 71a.

II. The analogous social security context confirms that Section 7266(a)'s time limit is not jurisdictional. This Court repeatedly has held that the 60-day time limit for claimants to seek judicial review of an agency denial of social security disability benefits is not jurisdictional but is rather a limitations period. *E.g.*, *Bowen v. City of New York*, 476 U.S. 467, 480-81 (1986). Congress could not have intended to treat our Nation's disabled veterans more harshly than social security disability claimants, particularly given the vast similarities in the two benefits programs.

III. *Bowles v. Russell*, 551 U.S. 205 (2007), does not dictate that the time limit in Section 7266(a) is jurisdictional. This case bears no resemblance to *Bowles*, which involved a different statute, a different context, and a century's worth of precedent addressing court-to-court appeals. This Court has recognized that those appeals are fundamentally different from initial judicial review of agency decisions derived from non-adversarial, pro-claimant administrative processes. *See Sims v. Apfel*, 530 U.S. 103, 110-12 (2000).

IV. The government also errs in relying on other dissimilar contexts in which the time to appeal agency orders in the circuit courts of appeals is considered jurisdictional. Br. in Opp. 10. The adversarial immigration context at issue in *Stone v. INS*, 514 U.S. 386 (1995), is not comparable to the veterans context. The government's reliance on the Administrative Orders Review Act of 1950 (Hobbs Act), ch. 1189, 64 Stat. 1129, is also misplaced. Unlike here, that Act clearly reflects congressional intent to make the time limit jurisdictional.

ARGUMENT

I. ALL INDICIA OF CONGRESSIONAL INTENT CONFIRM THAT SECTION 7266(a) IS NOT JURISDICTIONAL

Normal principles of statutory construction govern whether a statutory provision is jurisdictional in restricting a court's adjudicatory power. In other words, congressional intent is dispositive. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010); *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004). Discerning congressional intent "depends upon reading the whole statutory text, considering the purpose and context of the statute." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

The relevant statutory provision, Section 7266(a) of Title 38, U.S.C., states:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

38 U.S.C. § 7266(a). The Federal Circuit concluded in two previous en banc decisions that Section 7266(a)

is a limitations period and that the government had failed to overcome the presumption of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), that such limitations periods are subject to equitable tolling. *Jaquay v. Principi*, 304 F.3d 1276, 1284 (Fed. Cir. 2002) (en banc); *Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc). The government has not disputed that if Section 7266(a) is not jurisdictional, the 120-day time limit is a limitations period subject to equitable tolling. *Cf. Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) ("We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" (quoting *Irwin*, 498 U.S. at 95-96)).

The question before this Court, accordingly, is whether Congress intended the time limit in Section 7266(a) to restrict the jurisdiction of the Veterans Court. The statutory text, structure, history and purposes compel a "no" answer.

A. The Statutory Text Refutes A Jurisdictional Reading

The starting point is, of course, the statutory text. "If the Legislature clearly states that [a limitation] shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Reed Elsevier*, 130 S. Ct. at 1244 (quoting *Arbaugh*, 546 U.S. at 515-16). The converse is equally determinative. "[W]hen Congress does not rank a statutory limitation . . . as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.*

This Court accordingly has held that provisions lacking such a clear statement are not jurisdictional.

For instance, in finding that the Copyright Act's registration requirement is not jurisdictional, the Court in *Reed Elsevier* inquired "whether [17 U.S.C.] § 411(a) clearly states that its registration requirement is jurisdictional" and concluded "[i]t does not." 130 S. Ct. at 1245 (citations and internal quotation marks omitted). Similarly, in *Arbaugh*, 546 U.S. at 515-16, the Court held that the employee numerosity requirement for Title VII coverage under 42 U.S.C. § 2000e(b) is not jurisdictional because the statute does not "clearly stat[e]" any limit on a district court's jurisdiction. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982), the Court likewise held that the time limit for filing an EEOC charge under 42 U.S.C. § 2000e-5(e) is not jurisdictional because that provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."

The plain language of Section 7266(a) contains no statement, much less a clear statement, that the 120-day time limit restricts the jurisdiction of the Veterans Court. To the contrary, the natural reading of the statutory language is that Congress established a limitations period for a veteran to seek review of the VA's denial of disability benefits. Section 7266(a) establishes the time limit for a veteran to *commence* a civil action against the Secretary. A time limit for bringing a court action in the first instance is traditionally viewed as a statute of limitations. *See Black's Law Dictionary* 1546 (9th ed. 2009) (defining "statute of limitations" as "a statute establishing a time limit for suing in a civil case").

As the Federal Circuit explained in *Jaquay*, "the filing of a notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first

action taken by a veteran in a court of law." 304 F.3d at 1286. The majority below also recognized that petitioner's "appeal to the Veterans Court represented the first time he could appear before a court." Pet. App. 26a. By contrast, "[i]n the veterans' adjudicatory system, an appeal from the Veterans Court to [the Federal Circuit] is the procedural equivalent of an appeal from a district court to a court of appeals." *Id.* at 51a (Mayer, J., dissenting).

Other textual features indicate that the 120-day time limit is not jurisdictional. "[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Landgraf v. USI Films Prods.*, 511 U.S. 244, 274 (1994) (quoting *Rep. Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)); *Reed Elsevier*, 130 S. Ct. at 1243 (quoting same). Thus, the Court reasoned that a False Claims Act provision restricting actions based on the public disclosure of allegations or transactions, 31 U.S.C. § 3730(e)(4)(A) (amended 2009), was jurisdictional because the statutory language "sp[oke] to the power of a particular court." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468 (2007) (citations and internal quotation marks omitted).

Conversely, when Congress imposes the restriction on the litigant rather than the court, the statute should not be given a jurisdictional meaning. Thus, in *Reed Elsevier*, the government argued that the relevant statutory provision, 17 U.S.C. § 411(a), is not jurisdictional because it "speaks to the obligations of the parties rather than to the power of the court." Brief for the United States as Amicus Curiae at 14-15, *Reed Elsevier*, 130 S. Ct. 1237 (No. 08-103)

[hereinafter U.S. Br. *Reed*]; *see also Reed Elsevier*, 130 S. Ct. at 1243.

Section 7266(a) likewise speaks to the timely filing obligation of the veteran: "a *person* adversely affected by such decision shall file a notice of appeal with the Court within 120 days." 38 U.S.C. § 7266(a) (emphasis added). There is no textual basis for giving the time limit a jurisdictional gloss.

B. The Statutory Structure Refutes A Jurisdictional Reading

The statutory structure reinforces that Section 7266(a)'s 120-day time limit is not jurisdictional. This Court has recognized that a statutory requirement ordinarily is not jurisdictional when Congress places it in "an entirely separate provision" from the provision conferring jurisdiction. *Zipes*, 455 U.S. at 394. Thus, in *Zipes*, the Court reasoned that "[t]he provision granting district courts jurisdiction under Title VII does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement." *Id.* at 393-94 (citations omitted). Other decisions by this Court are to the same effect. *See Reed Elsevier*, 130 S. Ct. at 1245-46 ("§ 411(a)'s registration requirement . . . is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over [infringement actions]"); *Arbaugh*, 546 U.S. at 515-16 ("[T]he 15-employee threshold appears in a separate provision" apart from the provision conferring jurisdiction.).[2]

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[2] A counter-example is the time limit in 28 U.S.C. § 2107. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 n.6 (2003). The Court in *Bowles* did not discuss the statutory structure of Section 2107 but rather relied on its longstanding and settled

The 120-day time limit for disabled veterans to sue is located in a provision separate and apart from the provision that confers jurisdiction on the Veterans Court. The jurisdiction-conferring provision, 38 U.S.C. § 7252(a), is entitled "Jurisdiction; finality of decisions," and provides:

> The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

Congress placed Section 7252(a) in the statutory subchapter addressing the Veterans Court's "Organization and Jurisdiction." 38 U.S.C. ch. 72, subch. I; *see also Scarborough v. Principi*, 541 U.S. 401, 413 (2004) (distinguishing Section 7252(a)'s jurisdictional grant from a separate non-jurisdictional provision containing a time limit).

By contrast, Congress placed the 120-day time limit in a subchapter describing "Procedure" for the Veterans Court. 38 U.S.C. ch. 72, subch. II. In addition to the 120-day time limit, that subchapter contains provisions addressing "Rules of practice and procedure," 38 U.S.C. § 7264, and other housekeeping matters. *E.g.*, *id.* §§ 7261-7269. Congress's placement of Section 7266(a) in the subchapter dealing with "procedure" is consistent with the principle that "statutes of limitations" are among the "procedural requirements for triggering the right to an adjudica-

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precedent holding that the time limit is jurisdictional. *Bowles*, 551 U.S. at 209-11; *see infra* Part III.

tion." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

Section 7252 also makes no reference to the 120-day time limit in Section 7266(a). Section 7252 does, however, cross-reference a different provision in the statutory subchapter on "Procedure." Section 7252(b) provides that "[t]he extent of the [Veterans Court's] review shall be limited to the scope provided in section 7261 of this title." 38 U.S.C. § 7252(b); *see id.* § 7261(a) (authorizing Veterans Court to decide questions of law and barring court from reviewing Board's factual findings de novo). Thus, Congress knew how to incorporate rules of procedure into the jurisdiction-conferring provision under Section 7252 but did not do so with respect to the 120-day time limit.

C. The Statutory History And Purposes Refute A Jurisdictional Reading

Congress enacted Section 7266(a) in 1988 as part of the Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301(a), 102 Stat. 4105, 4116-17 (1988). There, Congress sought "to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from the VA every benefit and service to which he or she is entitled under law." S. Rep. No. 100-418, at 31 (1988); *accord id.* at 29; H.R. Rep. No. 100-963, at 13, 26 (1988) (similar). Congress also sought to eliminate the perception among veterans that they had been "denied their 'day in court.'" S. Rep. No. 100-418, at 30-31. A jurisdictional reading of the 120-day time limit would defeat that congressional purpose by depriving disabled veterans of their day in court when they miss the deadline through no fault of their own.

The VA administrative process for veterans' disability benefits is a "completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963, at 13. Congress imposed on the VA an affirmative "duty to assist" the veteran in developing his or her benefits claim within the agency. 38 U.S.C. § 5103A. Congress also required the VA in considering a veteran's claim to give "the benefit of the doubt" to the veteran. *Id.* § 5107(b).

The administrative process is entirely non-adversarial with no government official opposing the veterans' request for benefits, even before the Board. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309-11 (1985); 38 C.F.R. §§ 3.103(a); 20.700(c). In that respect, Congress contemplated that the majority of veterans would proceed without the benefit of counsel. Indeed, before 2006, veterans were restricted from obtaining counsel at any stage of the administrative process. *See supra* p. 6.

An inflexible jurisdictional bar to initial court review—one that denies disabled veterans with meritorious claims any opportunity to be heard in any court—would be an anti-veteran rule within an otherwise pro-veteran scheme. It would prevent *all* disabled veterans in *all* cases from obtaining equitable tolling of the 120-day time limit, no matter how equitable the circumstances of an untimely filing.

For instance, imposing a jurisdictional gloss on Section 7266(a) would foreclose judicial review even where, as here, the condition that prevents the veteran from filing within 120 days is the same disability for which the veteran seeks benefits. *See*

also, e.g., *Batten v. Shinseki*, No. 09-1158, 2009 WL 3236275, at *1-3 (Vet. App. Oct. 9, 2009); *Allen v. Shinseki*, No. 06-2574, 2009 WL 1424093, at *1 (Vet. App. May 22, 2009); *Jones v. Peake*, 22 Vet. App. 247, 248 (2008). It would be passing strange to conclude that Congress "create[d] a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Pet. App. 46a (Mayer, J., dissenting).

A jurisdictional reading similarly would foreclose court access even where the VA affirmatively misleads a seriously disabled veteran as to the filing deadline. *See Bailey*, 160 F.3d at 1361-62. This concern is hardly theoretical. The VA is notorious for mishandling veterans' attempts to seek judicial review of benefit denials. *See, e.g.*, *Bove v. Shinseki*, No. 08-1468, 2010 WL 318524, at *1-2 (Vet. App. Jan. 28, 2010) (where VA regional office accepted veteran's notice of appeal and gave him a date-stamped copy to memorialize filing, court noted that VA's indifference to misfiling "provides sad commentary on the [VA's] interest in assuring that this veteran had the opportunity to have his case heard at the Court"); *Irwin v. Shinseki*, 23 Vet. App. 128, 135 (2009) ("[T]he Court is concerned that the VA had the documents for four months and did nothing."); *Norman v. Shinseki*, No. 08-0228, 2010 WL 1710732, at *1 (Vet. App. Apr. 28, 2010) (similar); *Posey v. Shinseki*, 23 Vet. App. 406, 411 (2010) (Hagel, J., concurring) (The "VA somewhat routinely holds correspondence from claimants that it determines sometime after receipt are Notices of Appeal to this Court . . . permitting the Secretary to then move to dismiss the appeals for lack of jurisdiction."); *cf. Bowen v. City of New York*, 476 U.S. 467, 480-81 (1986) (equitable tolling where agency's

secretive conduct prevented disability claimants from discovering unlawful action).

Moreover, "[b]ecause so many veterans must file their petitions without the assistance of counsel, it is highly unlikely Congress intended for section 7266(a) to serve as a harsh and inflexible jurisdictional bar." Pet. App. 69a (Mayer, J., dissenting). In analogous contexts, this Court has recognized that inflexible rules are "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Zipes*, 455 U.S. at 397 (citations and internal quotation marks omitted) ("filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite . . . but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); *accord Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002) (permitting untimely verification of EEOC charge to relate back to a timely filed charge because Title VII is "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process" (citations and internal quotation marks omitted)).

The government concedes that a jurisdictional rule would inflict "painful" and "unfair" results based on "circumstances beyond a veteran's control." Br. in Opp. 5, 13. The government nonetheless surmises that Congress might have intended to impose a jurisdictional time bar to further "systemic interests in finality and efficient administration." *Id.* at 5. But the pro-veteran statutory scheme belies that suggestion.

The government's invocation of "finality" and "efficient administration" also is rather curious given the realities of the VA administrative process. That

process now takes on average roughly *three and a half years* from the date of the veteran's application for disability benefits with the regional office until the Board issues the agency's final decision.[3] In more than a third of cases, the Board remands for the regional office to "correct[] procedural errors and obtain[] additional evidence" needed to decide the veteran's claim. 2009 GAO Rept., *supra*, at 10; *see also* 2009 Board Rept., *supra*, at 21. Such a remand typically adds nearly an additional *year and a half* to the administrative process. 2009 Board Rept., *supra*, at 16. Yet the government's proposed rule would foreclose judicial review even if a severely disabled veteran missed the time limit by one day because he was hospitalized by the very disability for which he sought benefits.

Moreover, veterans challenging an administrative decision denying benefits prevail in roughly *80 percent* of cases decided by the Veterans Court on the merits, and have been awarded attorneys' fees in more than *50 percent* of cases over the past two years. Veterans Court Rept., *supra*, at 1. Thus, the government has long been criticized for its own delay and mishandling of veterans' disability claims, causing "too many cases to stay open and to recycle back through the regional offices and the [Board], only then to recycle back" to the Veterans Court. James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide*

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[3] *See* U.S. Gov't Accountability Office, GAO-09-910T, Veterans' Disability Benefits: Preliminary Findings on Claims Processing Trends and Improvement Efforts 7 (2009) [hereinafter 2009 GAO Rept.]; 2009 Board Rept., *supra*, at 16.

Fairness to Claimants, 53 Admin. L. Rev. 223, 229 (2001).[4]

Before the decision below, the Federal Circuit, beginning in 1998, consistently had treated the 120-day limit as a statute of limitations subject to equitable tolling. *See, e.g.*, *Jaquay*, 304 F.3d at 1286; *Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005); *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005); *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004); *Brandenburg v. Principi*, 371 F.3d 1362, 1364 (Fed. Cir. 2004); *Bailey v. Principi*, 351 F.3d 1381, 1384 (Fed. Cir. 2003); *Santana-Venegas v. Principi*, 314 F.3d 1293, 1296-98 (Fed. Cir. 2002); *Bailey*, 160 F.3d at 1368. Given the history of the VA's mishandling of claims and appeals, as well as the unfortunate reality that many veterans suffer severe disabilities that prevent a timely filing, it is hardly surprising that Congress left that line of precedent undisturbed.

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Congress repeatedly has

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[4] *See also id.* at 229 ("The veterans' benefits decisional process . . . is only a carousel of remand, mishandling, rehearing, remand, and so on. Many of the longest riders on the carousel are World War II veterans who are dying of old age while they await their benefits."); James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 Veterans L. Rev. 113, 129-31, 136-37 (2009) (noting that VA's poor record-keeping and understaffing and the Board's failure to explain its decisions contribute to Veterans Court's remand rate).

amended provisions of Title 38, Chapter 72 of the United States Code, without eliminating equitable tolling under Section 7266(a). *See* Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, §§ 601-605, 122 Stat. 4145, 4176-80; Veterans Benefits Act of 2002, Pub. L. No. 107-330, §§ 401-402, 116 Stat. 2820, 2832; Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, §§ 507, 601-605, 115 Stat. 976, 997-1000; Veterans Millennium Health Care and Benefits Act, Pub. L. No. 106-117, §§ 1001-1036, 113 Stat. 1545, 1587-95 (1999).

In 2001, Congress amended Section 7266 itself. But rather than preclude equitable tolling, Congress eased the procedure for a veteran to file in the Veterans Court by striking a previous requirement that the veteran serve the Secretary with his or her notice of appeal. *See* Pub. L. No. 107-103, § 507, 115 Stat. at 997. In short, "[i]n the eleven years since *Bailey*, Congress has had ample opportunity to overturn the application of tolling in Veterans Court proceedings, but has declined to do so." Pet. App. 69a (Mayer, J., dissenting).

D. The Pro-Veteran Canon Of Statutory Construction Removes Any Doubt As To Congressional Intent

The foregoing discussion demonstrates that Congress did not intend to impose a jurisdictional deadline for veterans to seek judicial review. But any doubt on this score is removed by the pro-veteran canon of statutory construction. This Court has long recognized the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent Hosp.*, 502 U.S. 215, 220 n.9 (1991) (citing *Fishgold v.*

Sullivan Dry Dock & Repair Corp., 328 U.S. 275, 285 (1946)). Thus, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see also Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009) ("[W]e recognize that Congress has expressed special solicitude for the veterans' cause."); *id.* at 1709 (Souter, J., dissenting) (noting "Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions").

As discussed, the plain text of Section 7266(a) contains no language whatsoever that the 120-day time limit restricts the jurisdiction of the Veterans Court. Several other features of the pro-veteran statutory scheme point away from a jurisdictional reading. Under these circumstances, it would turn the pro-veteran canon on its head to conclude that Congress intended that a disabled veteran "will be both 'out of luck and out of court'" if he misses the deadline based on the very disability for which he seeks benefits. Pet. App. 46a-47a (Mayer, J., dissenting). That "calamitous" result, *id.* at 71a, is "the antithesis of what Congress intended." *Id.* at 68a.

II. THE TIME LIMIT TO SEEK JUDICIAL REVIEW IN A CLOSELY ANALOGOUS DISABILITY CONTEXT IS NOT JURISDICTIONAL

A. The Time Limit To Seek Judicial Review Of Social Security Benefit Denials Is Not Jurisdictional

In *Bowen v. City of New York*, 476 U.S. 467, 478-82 (1986), this Court unanimously held that the 60-day time limit for a claimant to seek judicial review of an agency decision denying social security disability ben-

efits under 42 U.S.C. § 405(g) is not jurisdictional and is subject to equitable tolling. The Court rejected the government's argument that the 60-day time limit under Section 405(g) "sets the bounds of the [reviewing court's] jurisdiction" and therefore bars application of the doctrine of equitable tolling. *Bowen*, 476 U.S. at 478. The Court explained that the government's argument was foreclosed by two of its previous decisions recognizing that "the 60-day requirement is not jurisdictional, but rather constitutes a period of limitations." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 328 n.9 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975)).

Bowen further concluded that equitable tolling is available under Section 405(g). The Court observed that the time limit "is contained in a statute that Congress designed to be 'unusually protective' of claimants." *Id.* at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)).

It would be exceedingly anomalous to conclude that Congress intended to treat the Nation's disabled veterans more harshly than social security claimants. If anything, Congress surely intended to give even greater protection to veterans who were disabled in the line of duty. The government offers no persuasive reason why Congress would want to allow equitable tolling for social security claimants but not for veterans who likewise seek disability benefits. The evidence indeed is to the contrary. Congress established judicial review for veterans specifically to eliminate "unwarranted distinctions that exist between protections accorded to veterans and claimants for Federal benefits from other agencies." S. Rep. No. 100-418, at 31.

B. The Social Security And Veterans' Disability Contexts Are Indistinguishable In The Relevant Respects

"If there is a system in the federal judiciary closely analogous to veterans law, it is the social security disability system." Ridgway, *supra*, at 162; *see also McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (noting that social security and veterans' disability benefits programs share a "marked similarity"). The government itself has argued that "[t]here is no reason to apply a different rule" for veterans and social security claimants. Brief for the United States at 25, *Sanders*, 129 S. Ct. 1696 (No. 07-1209) (rule of prejudicial error).

As particularly relevant here, the time limit for social security disability claimants to seek judicial review is functionally identical to the time limit for veterans to seek judicial review. Section 405(g) states:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may *obtain a review* of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

42 U.S.C. § 405(g) (emphasis added); *compare* 38 U.S.C. § 7266(a) ("In order to *obtain review* . . . a person adversely affected by [the Board's] decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed." (emphasis added)).

Both provisions impose a timely filing obligation on the claimant, rather than a limit on the power of the reviewing court. Congress also placed both time limits in statutory provisions addressed to "procedure." *Compare* 42 U.S.C. § 405 (entitled "Evidence, procedure, and certification for payments") *with* 38 U.S.C. § 7266 (appearing in statutory subchapter governing Veterans Court "Procedure"). And both administrative processes are unusually non-adversarial and pro-claimant. *See Sims v. Apfel*, 530 U.S. 103, 111 (2000) ("[T]he SSA 'conduct[s] the administrative review process in an informal, nonadversary manner.'" (quoting 20 C.F.R. § 404.900(b) (1999))).

Section 405(g) and Section 7266(a) are both "time of review provision[s]." Pet. App. 25a. In other words, both disability contexts impose a time limit for seeking judicial review for the first time in a court. Both disability contexts require that court to apply a deferential standard of appellate review to the agency's decision. *See infra* p. 48. The social security disability context thus directly refutes the majority's holding that "because § 7266(a) is a time of review provision, it is jurisdictional." Pet. App. 25a.

The government casts the social security context aside by asserting that a social security claimant "commences" a "new civil action" in district court under Section 405(g), whereas a veteran under Section 7266(a) seeks judicial review "in *an existing case*." Br. in Opp. 8 (emphasis added). The government is just wrong.

The proceedings before the Board and the Veterans Court represent different cases with distinct case numbers. *Compare* Pet. App. 103a (Board proceeding captioned "In the Appeal of David L. Henderson, Docket No. 03-24 052") *with id.* at 74a (Veterans

Court proceeding captioned "Henderson v. Peake," "No. 05-0090"). Just like the social security system, the first time two adversarial parties appear in a caption is when the veteran first institutes suit in the Veterans Court. Or in the government's words, under Section 7266(a) the veteran "commences" a "new civil action." *See also* Pet. App. 26a, 74a, 103a (relying on the fact that the veteran's suit in Veterans Court is a "civil action").

III. *BOWLES* IS INAPPOSITE IN THE VETERANS CONTEXT

This Court in *Bowles* held that the time limits under 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 4 for a party to appeal a district court judgment to a circuit court of appeals are "jurisdictional." 551 U.S. at 206. In *Bowles*, the district court granted a state prisoner's motion to reopen the appeal period under Section 2107(c) and Rule 4(a)(6), but the court gave the prisoner 17 days, rather the statutorily prescribed 14 days, to file his notice of appeal. *Bowles*, 551 U.S. at 207. The prisoner filed the notice outside the 14-day window but within the time designated by the court. *Id.*

In holding that those equitable circumstances could not cure the untimely appeal, *Bowles* overruled two of the Court's prior decisions to the extent they had endorsed a "unique circumstances" doctrine for extending the time limit to appeal. *Id.* at 214 (overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam) and *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam)). In stressing that courts lack the power to make equitable exceptions to the time limit, *Bowles* stated that "[t]oday we make clear that the timely filing of a

notice of appeal in a civil case is a jurisdictional requirement." *Id.* at 214.

Seizing on the quoted passage from *Bowles*, the majority below syllogistically reasoned that (1) a veteran files a notice of appeal (2) in a case that is civil, and thus (3) the 120-day time limit for a veteran to seek judicial review of a benefit denial is jurisdictional. Pet. App. 25a-28a. The government repeatedly echoes that logic. Br. in Opp. 6-8, 12.

The majority's approach erroneously presumed that *Bowles* altered the relevant inquiry that looks to the traditional indicia of congressional intent, including the statutory text, structure, history and purposes. *Bowles* did not. *See Reed Elsevier*, 130 S. Ct. at 1248 ("*Bowles* . . . is thus consistent with the *Arbaugh* framework."). The court of appeals wrenched the quoted sentence from *Bowles* out of context and woodenly extended it to the veterans context as if the sentence were a statute. But this Court does not "parse the text" of its opinions "as though that were itself the governing statute." *Comm'r of Internal Revenue v. Bollinger*, 485 U.S. 340, 349 (1988); *see also Nevada v. Hicks*, 533 U.S. 353, 372 (2001). As this Court recently made clear, "*Bowles* stands for the proposition that context . . . is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1247-48. A comparison between the court-to-court appeal context of *Bowles* and the veterans context shows that the majority's syllogism is fatally flawed on multiple levels.

A. Unlike The Statute In *Bowles*, Section 7266(a) Speaks To The Obligation Of A Litigant, Not The Power Of The Court

Section 7266(a)'s text materially differs from Section 2107. Whereas Section 7266(a) speaks to the timely filing obligation of a veteran, Section 2107(a) is framed as a limitation on the power of the court of appeals to hear a case:

> Except as otherwise provided in this section, *no appeal* shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature *before a court of appeals for review unless* notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

28 U.S.C. § 2107(a) (emphasis added); *see also id.* § 2107(c). As the government has argued, this provision "speaks to the power of the court of appeals (rather than to the behavior of the litigant) by stating that an untimely notice of appeal will not bring the case to the court." U.S. Br. *Reed*, *supra*, at 16 n.7.

The court below acknowledged that "§ 2107, the statute at issue in *Bowles*, is phrased in terms of what the district court can and may do, [while] § 7266(a) is phrased in terms of the actions a veteran must take to preserve his or her right to appeal." Pet. App. 39a. But the court found this of no moment because Section 7266(a) "states that the notice of appeal '*shall*' be filed with the Veterans Court within 120-days," and *Boules* gave "jurisdictional significance" to the fact that a time limit is imposed in a statute "as opposed to in a court-promulgated rule." *Id.* at 39a-40a.

Neither explanation justifies treating the 120-day time limit as jurisdictional. *Reed Elsevier* squarely

rejected the proposition that *Bowles* "hold[s] that all statutory conditions imposing a time limit should be considered jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1247. This Court elsewhere has "clarified that time prescriptions, however emphatic, are not properly typed jurisdictional." *Arbaugh*, 546 U.S. at 510 (citations and internal quotation marks omitted); *see* U.S. Br. *Reed*, *supra*, at 15 ("Section 411(a) states the registration requirement in 'emphatic' terms, but that does not suggest that the provision is jurisdictional."); *cf. Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010) (noting that use of "shall" in statute does not necessarily restrict the power of a court to take action).

Moreover, unlike Section 7266(a), Section 2107(c) specifies the precise amount of time a court may extend the filing deadline. "Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c) that limitation is more than a simple 'claim-processing rule.'" *Bowles*, 551 U.S. at 213.

B. There Is No Settled Tradition Of Treating Time Limits In The Veterans Context As Jurisdictional

1. *Bowles* relied on "a long line of this Court's decisions left undisturbed by Congress" that had recognized that the time period for a court-to-court appeal was jurisdictional. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 130 S. Ct. 584, 597 (2009); *accord Reed Elsevier*, 130 S. Ct. at 1251 (Ginsburg, J., concurring) (same). Thus, the Court explained that it repeatedly had described the time limits set forth in Section 2107 as "mandatory and jurisdictional." *Bowles*, 551 U.S. at 209; *cf. John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (simi-

larly relying on *stare decisis* to hold that time limit for filing suit in Court of Federal Claims is jurisdictional).

Bowles also explained that, "[r]eflecting the consistency of this Court's holdings, the courts of appeals routinely and uniformly dismiss untimely appeals [under Section 2107] for lack of jurisdiction." *Bowles*, 551 U.S. at 210. And citing decisions interpreting Section 2107's historic predecessors, *Bowles* recognized that "even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction." *Id.* A contrary interpretation of Section 2107 thus would "require the repudiation of a century's worth of precedent and practice in American courts." *Id.* at 209 n.2.

The cornerstone of *Bowles*—a century of this Court's precedents—is glaringly absent here. At the time Congress established judicial review for disabled veterans, *Bowen*, *Weinberger v. Salfi*, and *Mathews v. Eldridge* had held that "time limits for seeking initial court review of adverse agency actions are generally classified as statutes of limitations rather than jurisdictional bars." Pet. App. 52a (Mayer, J., dissenting); *see supra* pp. 30-31. The lower courts also have not "routinely and uniformly" dismissed untimely veterans' claims under Section 7266(a) for lack of jurisdiction. *Bowles*, 551 U.S. at 210. To the contrary, the Federal Circuit had held that Section 7266(a) is a statute of limitations subject to equitable tolling, and Congress repeatedly amended the statute leaving those precedents undisturbed. *See supra* pp. 28-29.

2. Further, unlike *Bowles*, application of equitable tolling of the 120-day time limit under Section 7266(a) by an Article I court does not implicate

the separation of powers concerns implicit in the federal courts' interpretation of statutes establishing their own jurisdiction. *See Bowles*, 551 U.S. at 212-13 (stating that the Court's decision "follows naturally" from the principle that "[w]ithin constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider").

Because Congress established the Veterans Court in 1988 as an Article I court, there is no risk of an Article III court overstepping its own bounds by allowing equity to increase the cases that the Veterans Court can hear. To the contrary, depriving the Veterans Court of the power to apply equitable tolling would defeat Congress's pro-veteran purpose in creating the Veterans Court.

C. The Veterans Context Fundamentally Differs From The Court-to-Court Context Of *Bowles*

1. *The government's proposed jurisdictional rule is anti-veteran*

Bowles establishes an even-handed time limit for *all* civil litigants, including the government, to appeal an Article III district court's judgment to a court of appeals. *See, e.g., United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1096-1101 (9th Cir. 2008) (dismissing the government's appeal as untimely under *Bowles*). *Bowles*'s jurisdictional rule may produce unjust or unattractive results in some cases, but the rule will not systematically damage the interests of a class of litigants for which Congress was solicitous in passing legislation. The rule the government advances, however, would apply only to veterans. *See* 38 U.S.C. § 7252(a) (barring the Secretary from seeking judicial review of a Board decision).

A jurisdictional reading of the 120-day time limit thus would harm only disabled veterans.

It would be rather peculiar to conclude that Congress enacted a jurisdictional time limit that would systematically harm veterans who have the worst injuries or who are most abused by the VA bureaucracy. Such a rule would turn the informal, non-adversarial nature of VA proceedings against disabled veterans and prevent those veterans who most need review beyond the VA stage from getting it, contrary to the very purposes for which Congress established judicial review of veterans' claims. Holding that the time limit is jurisdictional would create a harsh divide between the agency and the courts that many veterans would fail to cross, and veterans would be all the more unwary because of the non-adversarial, pro-claimant, informal nature of the VA proceedings. That regime would leave veterans, many of whom are unrepresented by counsel and return from the battlefield with devastating injuries, ill-prepared for the rigid formality of the appeal process as envisioned by the government.

2. *The non-adversarial nature of VA proceedings distinguishes the veterans context from* Bowles

This Court has specifically "warned against reflexively 'assimilating the relation of administrative bodies and the courts to the relationship between lower and upper courts.'" *Sims*, 530 U.S. at 110 (citations, internal quotation marks, and alterations omitted). "[I]t is well settled that there are wide differences between administrative agencies and courts." *Id.* (citations and internal quotation marks omitted). Given these differences, the Court in *Sims* declined to extend a waiver rule applicable in court-

to-court appeals to social security claimants seeking district court review of an agency denial of disability benefits. *Id.* at 112. The Court reasoned that "the analogy to normal adversarial litigation" is "at its weakest" where the administrative process is "informal" and "not adversarial," and it is the agency's "duty to investigate the facts and develop the arguments both for and against granting benefits." *Id.* at 109-12.

It would be equally wrong to equate a disabled veteran's initial action seeking judicial review in the first instance to a court-to-court appeal. The Board is not a court and does not function like a court. The entire VA administrative process, at the Board and the VA regional office, is a "non-adversarial" and "completely ex-parte system of adjudication." H.R. Rep. No. 100-963, at 13; *accord Walters*, 473 U.S. at 309-12; 38 C.F.R. §§ 3.103(a), 20.700(c).

Far from opposing the veteran, the Secretary is required by statute to "assist" the veteran in developing his or her claim within the agency. 38 U.S.C. § 5103A. As the VA advises veterans, while the Board may hold an optional "hearing," *id.* § 7107(b), this is "not like the courtroom hearings you see on TV or in trials." VA Appeal Pamphlet, *supra*, at 9. A veteran meets with one Board member in a conference room or by videoconference. *Id.* (showing pictures).

Members of the Board, moreover, are not like the district court judges whose decisions are appealed under Section 2107 to a circuit court of appeals. The majority of Board members are VA employees designated by the Chairman to serve only temporarily. 2009 Board Rept., *supra*, at 17; *see* 38 U.S.C. § 7101(c)(1)(A). The Secretary appoints all Board

members except the Chairman, 38 U.S.C. § 7101A(a)(1), and the Secretary can remove members for poor "job performance" or "any other reason as determined by the Secretary." *Id.* § 7101A(e)(1). Even the Chairman can be removed for "inefficiency." *Id.* § 7101(b)(2). And the Board is "bound in its decisions by," among other things, "instructions of the Secretary." *Id.* § 7104(c).

3. *Unlike* Bowles, *the veteran seeks judicial review for the first time*

Unlike with an appeal of a district court decision to a court of appeals, the veteran who commences a suit in the Veterans Court appears for the first time in court. By contrast, in a court-to-court appeal the appellant has already had his day in court. Pet. App. 72a-73a (Mayer, J., dissenting) ("So while Bowles, a convicted murderer, had several opportunities to present his case in a court of law, Henderson will have none.").

The procedure for a disabled veteran to seek judicial review reflects the substantive reality that the veteran initiates suit for the first time. Just like a complaint filed in a district court, the notice of appeal to challenge a Board decision under Section 7266(a) is filed at the Veterans Court. 38 U.S.C. § 7266(a). And, like a district court, the Veterans Court may certify substantial questions of law for "interlocutory appeal" to the Federal Circuit. 38 U.S.C. § 7292(b); *cf.* 28 U.S.C. § 1292(b) (procedure for interlocutory appeal from district court to circuit court of appeals).

At the same time, the review performed by the Veterans Court materially differs from the review performed by Article III courts of appeals. Unlike the tradition of having a panel of three appellate

judges—which dates back to the Judiciary Act of 1789—Congress permitted the Veterans Court to decide cases by a single judge. *Compare* 38 U.S.C. § 7254(b) (permitting Veterans Court review by single judge) *with* 28 U.S.C. § 46(b) (circuit court appeal must be decided by panel of at least three judges); *see also* Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75 (1789).

The results of Veterans Court review also dramatically differ from those of the Article III courts of appeals. As discussed, veterans prevail in roughly 80 percent of cases decided by the Veterans Court on the merits. Veterans Ct. Rept., *supra*, at 1. Those figures are markedly higher than the roughly 11 to 16 percent reversal and remand rate for litigants appealing district court orders to the regional circuit courts of appeals. *See* Administrative Office of the U.S. Courts, Judicial Business of the U.S. Courts, Table B-5 (2000-2009 reports). The Veterans Court statistics more closely resemble district court reversal rates in appeals of agency decisions denying social security benefits.[5]

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[5] *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 Admin. L. Rev. 731, 741 (2003) ("District courts have long reversed and remanded disability cases on a greater than 50 percent basis, although these rates vary greatly among judicial districts."); Ridgway, *supra*, at 164-65 (arguing that Veterans Court reversal and remand rate, while unlike rates for court-to-court appeals, is comparable to rates for district court review in social security appeals).

D. The Appellate Review Performed By The Veterans Court Does Not Mean That The Time Limit Is Jurisdictional

1. With *Bowles* as the definitive guidepost, the majority below and the government place talismanic significance on the phrase "notice of appeal" in the text and title of Section 7266(a). Pet App. 26a-27a; Br. in Opp. 7. But Congress did not use the phrase "notice of appeal" in Section 7266(a) as a jurisdictional term of art against the backdrop of *Bowles*. The Court decided *Bowles* almost two decades after Congress enacted Section 7266(a). To the extent there was any background rule when Congress enacted Section 7266(a), it would not be the rule from this Court's precedents involving *court-to-court* appeals. Rather, when faced with an analogous context, this Court repeatedly had held that the time limit for a social security disability claimant to seek judicial review is a non-jurisdictional limitations period. *See supra* pp. 30-31.

Bowles, moreover, did not turn on the name of the form that the litigant files to initiate court action. Rather, *Bowles* held that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," 551 U.S. at 214, to make clear that Article III courts could not make equitable exceptions to the deadline for a court-to-court appeal *under 28 U.S.C. § 2107*. There was nothing magical in the phrase "notice of appeal." The Court relied on its previous decisions involving "writs of error" as well as petitions for writs of certiorari. *Bowles*, 514 U.S. at 210-12. All the decisions discussed in *Bowles* exclusively involved *court-to-court* appeals.

This Court does "not assume that a statutory word is used as a term of art where that meaning does not

fit. Ultimately, context determines meaning." *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010); *see also, e.g.*, *Deal* v. *United States* 508 U.S. 129, 132 (1993) ("[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."). Nothing in the text, structure, history or purposes of the veterans context suggests that Congress employed the phrase "notice of appeal" to convey that the time limit for seeking judicial review is jurisdictional. Pet. App. 62a-63a (Mayer, J., dissenting) ("There is not a scintilla of evidence in the legislative history to indicate that Congress used the term 'notice of appeal' in Section 7266(a) . . . to equate the filing a veteran makes at the Veterans Court with the filing a litigant makes to appeal a final district court judgment.").

Read in context, Congress employed the phrase "notice of appeal" in Section 7266(a) to describe the veteran's request to challenge the Board's decision. Congress thus used the terms "notice," "appeal," "appellate review," and "appellant" to refer to a veteran's request for further agency review in the administrative process. *See, e.g.*, 38 U.S.C. §§ 7104(a) (Board hears "appeals" of regional office decisions); 7105(a) (veteran files a "substantive appeal" to initiate "appellate review" before Board); 7105(b)(1) (veteran files "notice of disagreement" with the regional office); 7106 ("right of review on appeal" before Board); 7107(d)(1) (veteran is "appellant" before Board even though Secretary does not appear); 7108 (referring to an "application for review on appeal" before Board). Congress did not use the word appeal in this non-adversarial, pro-claimant administrative context to convey a rigid jurisdictional deadline. *See Percy v. Shinseki*, 23 Vet. App. 37, 42-44 (2009) (holding that statutory 60-day time limit

under 38 U.S.C. § 7105(d)(3) "to file the formal appeal" to the Board is not jurisdictional).

When Congress wanted to treat a veteran's notice of appeal like the notice under Section 2107 to take a court-to-court appeal, Congress explicitly expressed that intent. The provision that confers jurisdiction on the Federal Circuit to review decisions of the Veterans Court, Section 7292(a), thus states that the veteran must file "a notice of appeal with [the Veterans Court] within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts." 38 U.S.C. § 7292(a).

Section 7266(a) makes no similar reference to the time limit for appealing a district court's judgment to a circuit court of appeals. Thus, the presumption that a given term means the same thing throughout a statute is inapposite. That presumption "yields readily to indications that the same phrase . . . means different things, particularly where the phrase is one that speakers can easily use in different ways without the risk of confusion." *Barber v. Thomas*, 130 S. Ct. 2499, 2506 (2010). As discussed, all indicia of congressional intent point away from a jurisdictional reading of the 120-day time limit, and the pro-veteran canon of statutory construction removes any doubt as to Congress's intent.

2. The majority also reasoned that a proceeding in the Veterans Court has "characteristics of appellate review," such as a deferential standard of review that includes the rule of prejudicial error. Pet. App. 27a. The majority noted the government's related view that Section 7266(a) "is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the *lower court or tribunal* ends and

that of the appellate court begins." Pet. App. 23a-24a (quoting government's brief) (emphasis added).

As discussed, Congress did not intend to equate the Board with a lower court. Congress decisively rejected an adversarial court-like model in establishing the Board. Thus, the government errs in relying on the fact that the Board is a "tribunal" that performs "an adjudicative function." Br. in Opp. 9. The salient fact is that the Board is neither a court nor a tribunal *that adjudicates a dispute between two adversarial parties*. The VA's non-adversarial, ex parte administrative process simply culminates in a final agency decision that a disabled veteran may challenge in court. The Board is thus no different than the "tribunal(s)" of the Social Security Administration's Appeals Council or an Administrative Law Judge that perform "an adjudicative function," *id.*, in deciding social security disability claims. *See Sims*, 530 U.S. at 104-05. The disability claimants in both contexts have a time limit in which they may appeal the agency's decision, but that time limit is not jurisdictional.

The government also ignores that the appellate features of a Veterans Court proceeding are virtually identical to the social security context. "[T]he federal district court serves an appellate function in SSA disability review." Verkuil & Lubbers, *supra*, at 738; *see also, e.g.*, *Torres v. Barnhart*, 417 F.3d 276, 283 (2d Cir. 2005) (noting that an "appeal of Commissioner's final decision must be filed within 60 days"); *Traylor v. Astrue*, 668 F. Supp. 2d 624, 625 (D. Del. 2009) ("before the Court is an appeal" under Section 405(g)); *DiBlasi v. Comm'r of Social Security*, 660 F. Supp. 2d 401, 406 (N.D.N.Y. 2009) (hearing an "appeal" of an Appeals Council benefit denial); *Snyder v.*

Barnhart, 212 F. Supp. 2d 172, 174 (W.D.N.Y. 2002) ("This is an action brought pursuant to 42 U.S.C. § 405(g) in appeal of the [Commissioner's] final decision.").

The district court in the social security context, like the veterans context, thus:

- "review[s]" the agency's denial of disability benefits, 42 U.S.C. § 405(g);
- defers to the agency's factual findings, *id.* ("findings of the [agency] as to any fact, if supported by substantial evidence, shall be conclusive");
- applies the rule of prejudicial error, Brief for the United States at 25, *Sanders*, 129 S. Ct. 1696 (No. 07-1209) (citing cases);
- may "enter . . . a judgment affirming, modifying, or reversing the decision" of the agency, or may "remand" the case to the agency, 42 U.S.C. § 405(g); and
- is limited to "the pleadings and transcript of the record" before the agency. *Id.*

A timely filing under 42 U.S.C. § 405(g) also divests the agency of jurisdiction over the claimant's case. *Doctors Nursing & Rehab. Ctr. v. Sebelius*, --- F.3d ---, 2010 WL 2788564, at *3 (7th Cir. July 16, 2010) (holding that a Section 405(g) suit transfers jurisdiction over the case from the agency to the district court consistent with "normal procedures of appellate review").

IV. THE GOVERNMENT'S RELIANCE ON OTHER DISSIMILAR CONTEXTS IS MISPLACED

The government also relies on two dissimilar contexts in which the deadline for seeking judicial review of an agency order in a circuit court of appeals has been held to be jurisdictional. Neither context bears resemblance to the veterans context.

A. The Immigration Context Is Inapposite

The government, echoing the court of appeals, Pet. App. 14a, 26a, relies on this Court's decision in *Stone v. INS*, 514 U.S. 386 (1995). *See* Br. in Opp. 10. In *Stone*, the Court held that an alien's motion for reconsideration at the agency did not toll the 90-day time limit for the alien to seek judicial review of a deportation order in a circuit court of appeals. *Stone*, 514 U.S. at 394. The Court relied on a statute providing that "[w]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." *Id.* at 393-94 (quoting 8 U.S.C. § 1105a(a)(6) (1988) (current version at 8 U.S.C. § 1252(b)(6)). The Court found that provision "reflects Congress' understanding that a deportation order is final, and reviewable, when issued," and "[i]ts finality is not affected by the subsequent filing of a motion to reconsider." *Id.* at 405.

At the end of its opinion, the Court stated that the 90-day time limit for aliens to petition for review is "jurisdictional." *Id.* As support for that proposition, the Court cited *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990), which addressed the timeliness of a petition for a writ of certiorari, and Federal Rule of Appellate

Procedure 26(b), which bars the circuit courts of appeals from equitably tolling the time to petition for review of agency orders.

Stone does not dictate imposing a jurisdictional gloss on Section 7266(a). A veteran does not challenge the agency's decision in an Article III court of appeals but does so in the Veterans Court, which is then subject to further review by an Article III court of appeals. Further, the immigration administrative scheme is imbued with adversarial, court-like characteristics. *See, e.g.*, 8 U.S.C. § 1229(a) (government's proceeding is "against the alien"); *id.* § 1229a(b)(4) (alien "shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government"); *id.* § 1229a(c)(3) (government's burden is by "clear and convincing evidence"). And, the veterans context, like the social security context, involves an agency's denial of disability benefits. Congress could not plausibly have intended to treat severely disabled veterans seeking benefits like undocumented aliens subject to deportation. *See* Pet. App. 53a-54a (Mayer, J., dissenting).

The Court's reasoning in *Stone* further refutes the government's strained analogy to this case. In holding that a motion for reconsideration does not toll the 90-day time period to seek review of a deportation order, *Stone* emphasized Congress's "principal purpose" "to expedite petitions [by aliens] for review and to redress the related problem of successive and frivolous administrative appeals and motions." 514 U.S. at 400; *see Foti v. INS*, 375 U.S. 217, 224 (1963)

(describing Congress's purpose to eliminate "dilatory tactics in the courts" by aliens facing deportation). Those circumstances sharply differ from the veterans context; veterans' disability claims are overwhelmingly meritorious, and the government is the source of delay. *See supra* pp. 26-27.

B. The Hobbs Act Context Is Inapposite

The government also erroneously relies on the fact that the lower courts have treated as jurisdictional the 60-day time limit that private parties have to file a petition for review of certain agency orders under the Administrative Orders Review Act of 1950 (Hobbs Act), ch. 1189, 64 Stat. 1129 (codified as amended at 28 U.S.C. §§ 2341-2351). Br. in Opp. 10. The Hobbs Act context, however, significantly differs from the veterans context. A petition for review is filed directly in the circuit court of appeals. And the agency proceedings governed by the Hobbs Act, *see* 28 U.S.C. § 2342(1)-(7), are not comparable to the pro-claimant, non-adversarial disability claims process before the VA.

Moreover, the text of the Hobbs Act contains a clear statement of congressional intent to impose a jurisdictional time deadline. Section 2342 of the Hobbs Act provides the regional courts of appeals with "exclusive jurisdiction" to review specified agency orders. 28 U.S.C. § 2342. Section 2342 states that "[j]urisdiction is invoked by filing a petition *as provided by section 2344 of this title*." *Id.* (emphasis added). Section 2344 in turn imposes the 60-day limit. *Id.* § 2344.

There is no comparable clear statement of a jurisdictional limitation in the veterans context. As discussed, the statute conferring jurisdiction on the

Veterans Court, 38 U.S.C. § 7252(a), incorporates other procedural provisions but makes no reference whatsoever to the time limit contained in Section 7266(a).

* * *

For veterans returning home from a military conflict after being severely wounded or disabled, benefits are a crucial stepping-stone on the road to resuming a normal life. Congress did not intend to shut the courthouse doors to these deserving men and women where circumstances beyond their control prevent a timely filing in the Veterans Court.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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DAVID L. HENDERSON, PETITIONER

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 38 U.S.C. 7266(a), which establishes a 120-day time limit for filing a notice of appeal in the Court of Appeals for Veterans Claims in order to seek review of a decision of the Board of Veterans' Appeals, is subject to equitable tolling.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provision involved 2
Statement 2
Summary of argument 6
Argument:
The deadline for filing a notice of appeal prescribed by 38 U.S.C. 7266(a) is jurisdictional and not subject to equitable tolling 8
A. Statutory time limits for taking an appeal are jurisdictional 9
B. Section 7266(a) prescribes a statutory time limit governing the taking of an appeal to the Veterans Court 13
1. The plain language of Section 7266(a) makes clear that it prescribes a time limit for taking an appeal 13
2. The structure of the veterans judicial review system demonstrates that Section 7266(a) prescribes a time limit for taking an appeal 14
3. The legislative history makes clear that Section 7266(a) prescribes a jurisdictional time limit for taking an appeal 19
C. The rule recognized in *Bowles* applies to this case ... 24
D. The pro-veteran orientation of the VA adjudication system does not support petitioner's view that the deadline prescribed by Section 7266(a) is subject to equitable tolling 27
E. Petitioner's policy arguments do not justify treating Section 7266(a)'s 120-day deadline as nonjurisdictional 30
Conclusion 36

TABLE OF AUTHORITIES

Cases: Page

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 25
Bailey v. *West*, 160 F.3d 1360 (Fed. Cir. 1998) 23, 24
Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 25
Bowen v. *City of New York*, 476 U.S. 467 (1986) 14
Bowles v. *Russell*, 551 U.S. 205 (2007) ..... *passim*
Brown v. *Gardner*, 513 U.S. 115 (1994) 29
Butler v. *Derwinski*, 960 F.2d 139 (Fed. Cir. 1992) 23
Cellular Telecomms. & Internet Ass'n v. *FCC*, 330 F.3d 502 (D.C. Cir. 2003) 18
Cullens v. *Gober*, 14 Vet. App. 234 (2001) 32
Dudley v. *Derwinski*, 2 Vet. App. 602 (1992) 23
eBay, Inc. v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006) 28
Eberhart v. *United States*, 546 U.S. 12 (2005) 10
FEC v. *NRA Political Victory Fund*, 513 U.S. 88 (1994) 26
Florilli Corp. v. *Pena*, 118 F.3d 1212 (8th Cir. 1997) 18
Former Employees of Motorola Ceramic Prods. v. *United States*, 336 F.3d 1360 (Fed. Cir. 2003) 32
Forshey v. *Principi*, 284 F.3d 1335 (Fed. Cir.), cert. denied, 537 U.S. 823 (2002) 16, 28
Griggs v. *Provident Consumer Disc. Co.*, 459 U.S. 56 (1982) 10, 11
Holmes Group, Inc. v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) 28
INS v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) 13

Cases—Continued: Page

Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 6, 14
Jama v. *ICE*, 543 U.S. 335 (2005) 24
John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) 19, 27
Jones v. *Bock*, 549 U.S. 199 (2007) 12
Kelly v. *Nicholson*, 463 F.3d 1349 (Fed. Cir. 2006) 32
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 10
Lamie v. *United States Tr.*, 540 U.S. 526 (2004) 30
Lorillard v. *Pons*, 434 U.S. 575 (1978) 24
Reed Elsevier, Inc. v. *Muchnick*, 130 S. Ct. 1237 (2010) 11, 12, 13, 26
Shinseki v. *Sanders*, 129 S. Ct. 1696 (2009) 2, 5, 8, 15, 28, 29
Stone v. *INS*, 514 U.S. 386 (1995) 18, 26
United States v. *Beggerly*, 524 U.S. 38 (1998) 30
United States v. *Curry*, 47 U.S. (6 How.) 106 (1848) 10
United States v. *Denedo*, 129 S. Ct. 2213 (2009) 5, 27
United States v. *Locke*, 471 U.S. 84 (1985) 8, 31
United States v. *Rodriguez*, 67 M.J. 110 (C.A.A.F.), cert. denied, 130 S. Ct. 459 (2009) 27
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 27
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 14
Zipes v. *TWA*, 455 U.S. 385 (1982) 12, 25

Constitution, statutes and rules:

U.S. Const.:
Art. I 5, 7, 24, 27

Constitution, statutes and rules—Continued: Page

§ 8 5
Art. III 5, 24, 27
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Quiet Title Act, 28 U.S.C. 2409a 30
Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 511, 108 Stat. 4670 23
Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, 102 Stat. 4105 19
8 U.S.C. 1105a(a)(1) (Supp. V 1993) 26
8 U.S.C. 1252(b)(1) 26
17 U.S.C. 411(a) (Supp. III 2009) 11, 12
28 U.S.C. 1291 25
28 U.S.C. 2101 30
28 U.S.C. 2101(c) 26
28 U.S.C. 2107 ..... 9, 12, 25, 30
28 U.S.C. 2107(a) 9
28 U.S.C. 2107(c) 9
28 U.S.C. 2344 ..... 18, 30
38 U.S.C. 301(c)(5) 2
38 U.S.C. 5100 *et seq.* 2
38 U.S.C. 5104(a) 33
38 U.S.C. 5108 34
38 U.S.C. 5109A 34
38 U.S.C. 7101 *et seq.* 2
38 U.S.C. 7103 35

Statutes and rules—Continued: Page

38 U.S.C. 7105(d)(3) 23
38 U.S.C. 7111 34
38 U.S.C. 7251 15
38 U.S.C. 7252 ..... 2, 15
38 U.S.C. 7252(a) 25
38 U.S.C. 7252(b) 15, 22
38 U.S.C. 7261(a)(4) 15
38 U.S.C. 7261(b) 15
38 U.S.C. 7261(b)(2) 28
38 U.S.C. 7261(c) 15
38 U.S.C. 7266 ..... 4, 7, 13, 23
38 U.S.C. 7266(a) ..... *passim*
38 U.S.C. 7292 3
38 U.S.C. 7292(a) 20
38 U.S.C. 7292(d) 3, 16
42 U.S.C. 405(g) 14, 16, 17
42 U.S.C. 1997e(a) 12
42 U.S.C. 2000e-5(f)(1) 12
42 U.S.C. 2000e-16(c) 14
38 C.F.R.:
Section 3.156(a) 34
Section 14.629(a) 33
Fed. R. Bankr. P. 4004(a) 10
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Fed. R. Crim. P. 33 10

Miscellaneous: Page

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p. 31,788 22

Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs, 111th Cong. (July 1, 2010) 35

H.R. 5288, 100th Cong., 2d Sess. (1988) 20, 23

H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1 (1988) 20

Letter to Nancy Pelosi, Speaker of the House of Representatives, from Eric K. Shinseki, Secretary of Veterans Affairs (May 26, 2010) 35

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In the Supreme Court of the United States

No. 09-1036

DAVID L. HENDERSON, PETITIONER

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-73a) is reported at 589 F.3d 1201. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 74a-92a) is reported at 22 Vet. App. 217. The opinion of the Board of Veterans' Appeals (Pet. App. 103a-117a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2009. The petition for a writ of certiorari was filed on February 24, 2010, and was granted on June 28, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 7266(a) of Title 38 of the United States Code provides:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

STATEMENT

1. Veterans who claim benefits must apply to the Department of Veterans Affairs (VA). See 38 U.S.C. 5100 *et seq.* The initial decision on a benefits claim is generally issued by a VA regional office. See *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1701 (2009). A claimant may appeal an adverse decision of the regional office to the Board of Veterans' Appeals (Board), which is a component of the VA. See 38 U.S.C. 301(c)(5), 7101 *et seq.*

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court that has exclusive jurisdiction to review decisions of the Board. See 38 U.S.C. 7252. A statutory provision entitled "[n]otice of appeal" provides in pertinent part that, "[i]n order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed." 38 U.S.C. 7266(a).

Decisions of the Veterans Court may in turn be appealed to the United States Court of Appeals for the Federal Circuit. See 38 U.S.C. 7292. In such an appeal, the Federal Circuit shall "decide all relevant questions of law." 38 U.S.C. 7292(d). Except to the extent that the appeal "presents a constitutional issue," however, the court may not review "a challenge to a factual determination" or "a challenge to a law or regulation as applied to the facts of a particular case." *Ibid.*

2. Petitioner David L. Henderson was a veteran who applied for, and received, 100% disability benefits for paranoid schizophrenia connected to his military service.* Pet. App. 3a. In August 2001, he applied for supplemental benefits for in-home care. *Ibid.* The regional office denied his claim, and petitioner sought Board review. *Ibid.* In a decision dated August 30, 2004, the Board denied petitioner's appeal. *Ibid.* Petitioner then sought review in the Veterans Court, but he did not file a notice of appeal until January 12, 2005—15 days after the expiration of the 120-day period prescribed by Section 7266(a). *Ibid.*

3. The Veterans Court dismissed petitioner's appeal as untimely. Pet. App. 98a-102a. The court agreed with petitioner that the 120-day time limit for filing a notice of appeal is subject to equitable tolling "[i]n limited circumstances." *Id.* at 100a. The court concluded, however, that petitioner had failed to establish an entitlement to tolling because he had "not shown how a mental or physical illness caused his [notice of appeal] to be untimely." *Id.* at 102a.

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* We are informed by petitioner's counsel that Mr. Henderson died on October 24, 2010, and that counsel intends to file a motion to substitute his surviving spouse as petitioner.

Petitioner sought reconsideration of that ruling. The Veterans Court granted the motion for reconsideration and requested supplemental briefing on whether this Court's decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007), which held that statutory time limits for initiating an appeal are jurisdictional, precluded equitable tolling of the deadline for taking an appeal to the Veterans Court. Pet. App. 93a-95a. The Veterans Court ultimately concluded that the deadline in Section 7266(a) is not subject to tolling, and it again dismissed petitioner's appeal. *Id.* at 74a-92a.

4. Petitioner appealed to the Federal Circuit, and the case was argued before a panel of the court of appeals. After argument, but before the case was decided, the court *sua sponte* granted rehearing en banc. The en banc court affirmed the Veterans Court's dismissal order. Pet. App. 1a-43a.

a. The court of appeals began by noting this Court's holding in *Bowles* that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." Pet. App. 25a (quoting *Bowles*, 551 U.S. at 214). The court construed Section 7266(a) to be "a notice of appeal, or time of review, provision," and it concluded that the 120-day time limit "is jurisdictional" and therefore "not subject to equitable tolling." *Ibid.* In reaching that conclusion, the court rejected petitioner's argument that Section 7266(a) is more analogous to a statute of limitations than to a time-of-review provision. The court observed that Section 7266 is entitled "Notice of appeal" and that Section 7266(a) refers to the "timely filing of a notice of appeal" "in order to obtain *review*" by the Veterans Court. *Id.* at 26a-27a. The court further noted that the review performed by the Veterans Court is on the agency record and is performed under standards

"characteristic[] of appellate review, rather than of an assessment of claims in the first instance." *Id.* at 27a.

The court of appeals next examined the text and legislative history of Section 7266(a), discerning no "clear intent on the part of Congress to override the presumed jurisdictional treatment of time of review provisions." Pet. App. 29a. Nor, in the court's view, could *Bowles* persuasively be distinguished on the ground that it involved an appeal to an Article III court rather than to the Article I Veterans Court. *Id.* at 36a-37a. To the contrary, the court noted that jurisdictional limitations apply with "*added* force to Article I tribunals, . . . which owe their existence to Congress' authority to enact legislation pursuant to [Article I, Section 8] of the Constitution." *Id.* at 37a (quoting *United States* v. *Denedo*, 129 S. Ct. 2213, 2221 (2009)). Finally, the court of appeals rejected petitioner's contention that the pro-claimant nature of the veterans benefit system alters the jurisdictional character of Section 7266(a). *Id.* at 40a-41a. The court explained that "although 'Congress has expressed special solicitude for the veterans' cause,' we do not have free rein to establish special procedural schemes governing the veterans' system alone." *Id.* at 41a (quoting *Sanders*, 129 S. Ct. at 1707).

b. Judge Dyk concurred, joined by Judges Gajarsa and Moore. Pet. App. 44a-45a. While joining the opinion of the court, the concurring judges expressed the view that "the rigid deadline of the existing statute can and does lead to unfairness," *id.* at 44a, and they suggested "that Congress should amend the statute to provide a good cause exception," *id.* at 45a.

c. Judge Mayer dissented, joined by Judges Michel and Newman. Pet. App. 46a-73a. The dissenting judges characterized Section 7266(a) "as a statute of limitations

rather than a rigid jurisdictional bar," *id.* at 53a, and they viewed this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), as establishing a presumption of equitable tolling that was undisturbed by *Bowles*. Pet. App. 47a-48a. The dissenting judges also concluded that the court had failed to give adequate weight to what they described as the "uniquely pro-claimant adjudicatory scheme" that governs veterans benefits determinations. *Id.* at 66a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the time limit prescribed in 38 U.S.C. 7266(a) for filing a notice of appeal in the Veterans Court to obtain review of a decision of the Board of Veterans' Appeals is not subject to equitable tolling.

In *Bowles* v. *Russell*, 551 U.S. 205 (2007), this Court reaffirmed its "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 210. That treatment reflects the recognition that Congress's authority to "decide[] what cases the federal courts have jurisdiction to consider" means that Congress "can also determine when, and under what conditions, federal courts can hear" those cases. *Id.* at 212-213. Congress defines the jurisdiction of appellate courts when it prohibits them "from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment." *Id.* at 213. Accordingly, in a series of decisions going back to the nineteenth century, both this Court and the courts of appeals have treated such statutory time limits as jurisdictional. *Id.* at 210.

Section 7266(a) is a statute that prescribes a "time limit[] for taking an appeal." *Bowles*, 551 U.S. at 210. Petitioner suggests that it is actually a statute of limita-

tions governing the filing of a new civil action, but that contention is refuted by the statute itself—which refers to the filing of a "notice of appeal"—and by its title: "Notice of appeal." 38 U.S.C. 7266. And like a court of appeals reviewing an administrative agency's decision, the Veterans Court applies a deferential standard of review and limits its consideration to the record before the agency. In addition, the legislative history of Section 7266(a) shows that Congress viewed the Veterans Court as analogous to the federal courts of appeals, and that it considered the time limit of Section 7266(a) to be a deadline governing the initiation of an appeal.

Because Section 7266(a) is a statutory time limit for taking an appeal, it is jurisdictional under the rule recognized in *Bowles*. Petitioner suggests various features of Section 7266(a) that, in his view, make that rule inapplicable. He observes that Section 7266(a) is a provision separate from other statutes defining the Veterans Court's jurisdiction, that it refers to the actions of litigants and does not expressly address the power of the court, and that the Veterans Court is established under Article I of the Constitution. None of those observations, however, renders inapplicable the rule that "statutory time limits for taking an appeal [are] jurisdictional." *Bowles*, 551 U.S. at 210.

Petitioner contends that a jurisdictional time limit for taking an appeal to the Veterans Court would be an anomaly within the generally pro-veteran administrative scheme for adjudicating benefits claims. But that pro-veteran scheme coexisted for years with a complete preclusion of judicial review. When Congress first authorized judicial review of VA benefits decisions in 1988, it provided an unusually lengthy 120-day time limit for filing notices of appeal. The pro-veteran character of

the relevant administrative scheme affords no basis for reading into that statutory time limit an exception that Congress did not provide. Rather, the court of appeals correctly recognized that although "'Congress has expressed special solicitude for the veterans' cause,' [the court] do[es] not have free rein to establish special procedural schemes governing the veterans' system alone." Pet. App. 41a (quoting *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1707 (2009)).

Finally, petitioner argues that enforcement of the jurisdictional time limit in Section 7266(a) will lead to harsh results. Petitioner's concerns are overstated and fail to take account of features of the VA system that ensure that veterans are informed of their appeal rights and have multiple opportunities to obtain any benefits to which they are entitled. In any event, the potential for unfair results is a consideration for Congress to take into account in deciding whether to amend the statute. It is not a basis for courts to "create equitable exceptions to jurisdictional requirements." *Bowles*, 551 U.S. at 214.

ARGUMENT

THE DEADLINE FOR FILING A NOTICE OF APPEAL PRESCRIBED BY 38 U.S.C. 7266(a) IS JURISDICTIONAL AND NOT SUBJECT TO EQUITABLE TOLLING

In *Bowles* v. *Russell*, 551 U.S. 205 (2007), this Court held that "statutory time limits for taking an appeal" are jurisdictional. *Id.* at 210. Strict enforcement of such time limits will undoubtedly produce painful results in particular cases. See *United States* v. *Locke*, 471 U.S. 84, 101 (1985). It is ultimately up to Congress, however, to strike what it views as the appropriate balance between the protection of deserving litigants' access to

appellate review, on the one hand, and countervailing systemic interests in finality and efficient administration on the other. In striking that balance in the specific context of veterans-benefit appeals, Congress may take account of the fact that such appeals involve individuals to whom our Nation owes the greatest of debts.

This case involves 38 U.S.C. 7266(a), which prescribes the deadline for filing a notice of appeal in the Veterans Court to obtain review of a VA benefits determination made by the Board of Veterans' Appeals. Under the rule recognized and reaffirmed in *Bowles*, that deadline is a limitation on the jurisdiction of the Veterans Court, and the court of appeals correctly held that it is not subject to equitable tolling.

A. Statutory Time Limits For Taking An Appeal Are Jurisdictional

1. In *Bowles*, this Court reaffirmed its "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210. The Court considered 28 U.S.C. 2107, which provides that a notice of appeal in a civil case must be filed within 30 days of the judgment. See 28 U.S.C. 2107(a). Section 2107(c) gives district courts authority, in certain circumstances, to reopen the filing period for 14 additional days. The district court had purported to reopen the period for 17 days, and petitioner had filed a notice of appeal on day 16—that is, within the time set by the district court but outside of the period permitted by the statute. 551 U.S. at 207.

This Court held that the court of appeals lacked jurisdiction over the appeal. *Bowles*, 551 U.S. at 208. In reaching that conclusion, the Court noted that it had "long held that the taking of an appeal within the pre-

scribed time is 'mandatory and jurisdictional.'" *Id.* at 209 (quoting *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam)). It also observed that courts of appeals "routinely and uniformly dismiss untimely appeals for lack of jurisdiction," and that, "even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction." *Id.* at 210; see, *e.g.*, *United States* v. *Curry*, 47 U.S. (6 How.) 106, 113 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.").

The Court in *Bowles* acknowledged recent decisions in which it had "undertaken to clarify the distinction between claims-processing rules and jurisdictional rules." 551 U.S. at 210. In *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), for example, the Court held that Federal Rule of Bankruptcy Procedure 4004(a), which imposes a deadline for filing an objection to a debtor's discharge, does not affect the subject-matter jurisdiction of the bankruptcy court. Similarly, the Court held in *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), that the deadline for new-trial motions under Federal Rule of Criminal Procedure 33 is not jurisdictional. Each of those cases, however, involved a time limit for taking some subsidiary step in pending trial-court proceedings, rather than a deadline for seeking appellate review. In addition, both cases involved rules of court, not statutes enacted by Congress. For those reasons, the Court in *Bowles* explained, the decisions in *Kontrick* and *Eberhart* did not "call[] into question [the Court's] longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210.

2. A statute governing the timing of an appeal is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the inferior tribunal ends and that of the appellate court begins. See *Griggs*, 459 U.S. at 58 ("The filing of a notice of appeal is an event of jurisdictional significance" because "it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). Just as Congress has authority to "decide[] what cases the federal courts have jurisdiction to consider," Congress "can also determine when, and under what conditions, federal courts can hear" those cases. *Bowles*, 551 U.S. at 212-213. Congress defines the jurisdiction of appellate courts when it prohibits them "from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment." *Id.* at 213.

As the Court recognized in *Bowles*, Congress remains free if it wishes to "authorize courts to promulgate rules that excuse compliance with the statutory time limits," whether through equitable tolling or otherwise. 551 U.S. at 214. Where Congress has not conferred such discretion, however, courts have "no authority to create equitable exceptions to jurisdictional requirements." *Ibid.*

3. Petitioner relies heavily (Br. 18-21, 35-38) on this Court's decision in *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010). Contrary to petitioner's contentions, however, that decision does not cast doubt on the principle that statutory time limits for taking an appeal are jurisdictional. In *Reed Elsevier*, the Court held that compliance with 17 U.S.C. 411(a) (Supp. III 2009), which requires copyright holders to register their works before suing for infringement, is not a jurisdictional pre-

requisite to an infringement action. In reaching that conclusion, the Court emphasized that the determination whether a particular provision is jurisdictional turns not on the presence or absence of "a 'jurisdictional' label," but instead on "whether the type of limitation that [it] imposes is one that is properly ranked as jurisdictional absent an express designation." 130 S. Ct. at 1248.

The Court analogized the statute at issue in *Reed Elsevier* to other nonjurisdictional "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit." 130 S. Ct. at 1246-1247. For example, the requirement that a prisoner exhaust administrative remedies before challenging prison conditions in court is not jurisdictional, 42 U.S.C. 1997e(a); see *Jones* v. *Bock*, 549 U.S. 199, 216 (2007), nor is the requirement that a discrimination claimant file a timely charge with the Equal Employment Opportunity Commission (EEOC) before bringing a Title VII action in court, 42 U.S.C. 2000e-5(f)(1); see *Zipes* v. *TWA*, 455 U.S. 385, 392-398 (1982). Section 411(a), the Court concluded, imposes a similar nonjurisdictional "precondition to suit." *Reed Elsevier*, 130 S. Ct. at 1247.

The Court in *Reed Elsevier* distinguished Section 411(a) from the "type[s] of limitation" at issue in *Bowles*—that is, "statutory deadlines for filing appeals"—which, it reaffirmed, are properly regarded as jurisdictional. 130 S. Ct. at 1248. The *Reed Elsevier* Court noted that the Court in *Bowles* had examined "the historical treatment of statutory conditions for taking an appeal" and had "emphasized that this Court had long treated such conditions as jurisdictional, including in statutes *other* than § 2107." *Ibid.* Unlike Section 411(a), the Court explained, "[t]he statutory limitation in *Bowles* was of a type that [the Court] had long held *did*

'speak in jurisdictional terms' even absent a 'jurisdictional' label." *Ibid.* Accordingly, *Reed Elsevier* is fully consistent with the principle that statutory time limits governing appeals are jurisdictional.

B. Section 7266(a) Prescribes A Statutory Time Limit Governing The Taking Of An Appeal To The Veterans Court

Section 7266(a) establishes a statutory time limit governing the taking of an appeal to the Veterans Court. Under the rule reaffirmed in *Bowles*, that time limit is jurisdictional. Petitioner attempts to avoid that conclusion by arguing that Section 7266(a) is actually a statute of limitations, but that argument is inconsistent with the statutory text, with the structure of the veterans judicial review system, and with the legislative history.

1. The plain language of Section 7266(a) makes clear that it prescribes a time limit for taking an appeal

Congress could hardly have been clearer in specifying that Section 7266(a) imposes a time limit on the initiation of an appeal. The provision states that, "[i]n order to obtain review" in the Veterans Court of a decision of the Board, a person aggrieved by the decision "shall file a *notice of appeal* with the Court within 120 days." 38 U.S.C. 7266(a) (emphasis added). If there were any doubt on the point, it would be resolved by the title of Section 7266, which is "Notice of appeal." *See INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

Petitioner contends that Section 7266(a) is a statute of limitations that "establishes the time limit for a veteran to commence a civil action against the Secretary." Br. 19 (emphasis omitted). Petitioner argues that Section 7266(a) is analogous in particular to the statutes of

limitations governing Title VII actions and Social Security benefits claims, which, this Court has held, are subject to equitable tolling. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990); *Bowen* v. *City of New York*, 476 U.S. 467 (1986). Those analogies are misplaced because the language of Section 7266(a) is significantly different from that of the provisions at issue in *Irwin* and *Bowen*.

The Court in *Irwin* construed 42 U.S.C. 2000e-16(c) (1988), which permitted a federal employee to "file a civil action" based on a discrimination complaint "[w]ithin thirty days of receipt of notice of final action" by the EEOC. See 498 U.S. at 94-95. And the Court in *Bowen* construed 42 U.S.C. 405(g), which provides that an individual aggrieved by an administrative decision concerning Social Security benefits "may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision." See 476 U.S. at 478; *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). Unlike those statutes, Section 7266(a) does not refer to the "fil[ing]" or "commence[ment]" of a new "civil action," but only to the filing of a "notice of appeal." This Court's treatment of statutes of limitations therefore has no bearing here.

2. ***The structure of the veterans judicial review system demonstrates that Section 7266(a) prescribes a time limit for taking an appeal***

In addition to the textual differences between Section 7266(a) and the statutes at issue in *Bowen* and *Irwin*, there is also an important structural difference. Whereas the deadlines at issue in *Irwin* and *Bowen* pertained to the commencement of suit in district courts, the Veterans Court is an *appellate* court. Petitioner

identifies no case in which the deadline for seeking review of a decision in an appellate court has been held not to be jurisdictional.

a. The Veterans Court's status as an appellate court is apparent not only from the court's name—the "United States *Court of Appeals* for Veterans Claims," 38 U.S.C. 7251 (emphasis added)—but also from the nature of the veterans judicial review system. Unlike the federal district courts, the Veterans Court has no original jurisdiction. Its only statutory responsibility is to review the final decisions of a body—the Board of Veterans' Appeals—that itself performs an adjudicative function. See 38 U.S.C. 7252. The Veterans Court lacks authority to conduct its own factfinding and must limit its review to "the record of proceedings before the Secretary and the Board." 38 U.S.C. 7252(b). In examining that record, it must apply a deferential standard of review, setting aside the Board's factual findings only if it determines that they are clearly erroneous. 38 U.S.C. 7261(a)(4); see 38 U.S.C. 7261(c) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court."). It also must take due account of the rule of prejudicial error, which means that it must apply "the 'harmless error' rule applied by the courts in the review of lower court decisions as well as of administrative bodies." *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1704 (2009) (quoting United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 110 (1947) (emphasis omitted); 38 U.S.C. 7261(b).

Thus, both the functions of the Veterans Court and the manner in which it performs those functions are characteristic of appellate courts. To be sure, the Veterans Court is in the unusual position of being a federal

appeals court that is reviewed by another federal appeals court, but that neither transforms the Veterans Court into a trial court nor transforms its notice-of-appeal statute into a mere claims-processing deadline. And for certain aspects of a veteran's claim, the *only* available judicial appellate review is performed by the Veterans Court, since the Federal Circuit's jurisdiction is generally limited to reviewing questions of law. Except in constitutional cases, the Federal Circuit cannot review factual findings, even for clear error, and it cannot review the application of law to fact. 38 U.S.C. 7292(d); *Forshey* v. *Principi*, 284 F.3d 1335, 1345-1347, 1351 (Fed. Cir.) (en banc), cert. denied, 537 U.S. 823 (2002). Those features of typical appellate review are performed only by the Veterans Court.

b. Petitioner emphasizes (Br. 33-34) that a case in the Veterans Court does not have the same docket number it had before the Board. That fact hardly establishes, however, that the proceeding before the Veterans Court is a "new civil action." Cases in the federal courts of appeals are assigned docket numbers that differ from those that were used in the district court, just as cases in this Court have different docket numbers from those used in the underlying cases in the courts of appeals. That does not cast doubt on the fact that this Court and the courts of appeals act as appellate tribunals.

c. Petitioner argues (Br. 31-34) that because the Social Security disability system is analogous to the veterans disability system, Section 7266(a) should be construed similarly to 42 U.S.C. 405(g), which the Court in *Bowen* construed as establishing a nonjurisdictional limitations period. That argument lacks merit.

To be sure, the Social Security and veterans-benefit review mechanisms share significant common attributes.

In addition to the fact that both involve claims for federal disability benefits, the courts in both contexts review a pre-existing agency record under a deferential standard. Nothing in *Bowen* suggests, however, that the Court relied on *those* attributes in concluding that Section 405(g)'s 60-day deadline was not jurisdictional. To the contrary, confinement to an existing record and application of a deferential standard of review are more typically associated with appellate review than with trial-court proceedings. The *Bowen* Court's holding that Section 405(g) is not jurisdictional is best understood as resting on attributes of that provision that Section 7266(a) does not share. As explained above, whereas a veteran who seeks to challenge an adverse decision of the Board must appeal to the Veterans Court by filing a "notice of appeal," 38 U.S.C. 7266(a), a claimant wishing to challenge a decision by the Social Security Administration must "commence[ ]" a "civil action" in the district court, 42 U.S.C. 405(g), a step that is accomplished "by filing a complaint with the court," Federal Rule of Civil Procedure 3. And unlike the district courts that hear Social Security cases, the Veterans Court functions exclusively as an appellate tribunal.

Petitioner also contends that because a veteran who files a notice of appeal pursuant to Section 7266(a) thereby "appears for the first time in court," the notice of appeal is properly regarded as "commenc[ing] a suit." Br. 42; see Br. 35 (noting that a proceeding in the Veterans Court is not a "court-to-court appeal"). That argument lacks merit. To be sure, Congress *could* have authorized veterans (like Social Security claimants) to challenge agency benefits decisions by commencing a new suit. Section 7266(a)'s text (see pp. 13-14, *supra*) and history (see pp. 19-23, *infra*) make clear, however,

that Congress conceived of Veterans Court proceedings as "appeal[s]" rather than new civil actions.

Petitioner's argument logically suggests that, under the various statutory provisions that authorize direct court of appeals review of specified categories of agency decisions, the deadlines for seeking review are not jurisdictional, since under such provisions the court of appeals is the first court to act in the relevant matter. Petitioner cites no decision supporting that proposition, however, and the precedents of this Court and the courts of appeals are to the contrary. In *Stone* v. *INS*, 514 U.S. 386, 406 (1995), the Court held that the deadline for filing a petition for review of a decision of the Board of Immigration Appeals is jurisdictional, even though a petition for review provides the first opportunity to have a removal order considered by a court. Similarly, in other cases governed by the Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129, courts of appeals have uniformly held that the 60-day time limit on petitions for review of agency orders is jurisdictional and may not be waived even by consent of the parties. See 28 U.S.C. 2344; *Cellular Telecomms. & Internet Ass'n* v. *FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003); *Florilli Corp.* v. *Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997). Petitioner identifies no case in which a time limit for seeking review of an agency decision in an appellate court has been treated as nonjurisdictional.

Taken together, this Court's decisions in *Bowen*, *Bowles*, and *Stone* make clear that (1) statutory time limits for commencing suit against the government in a trial court are presumptively nonjurisdictional, and (2) statutory time limits for initiating an appeal, or for seeking review of agency action in a federal appellate court, are presumptively jurisdictional. Under that frame-

work, the 120-day deadline established by Section 7266(a) is presumptively jurisdictional. This Court has recognized that the text or history of a particular statute may override the presumptions described above. See *Bowles*, 551 U.S. at 214 ("If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits."); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-139 (2008) (holding that, although most limitations periods for commencing suit are subject to waiver or forfeiture, the six-year deadline for filing suit in the Court of Federal Claims is not). Nothing in the text of Section 7266(a), however, suggests an intent to depart from the usual rule that statutory deadlines for initiating appeals are jurisdictional. And, as we explain below, neither the history of Section 7266(a) nor its placement within the overall statutory scheme supports petitioner's view that the 120-day deadline is subject to equitable tolling.

3. The legislative history makes clear that Section 7266(a) prescribes a jurisdictional time limit for taking an appeal

Section 7266(a) was enacted in 1988 as part of the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A, 102 Stat. 4105, which, for the first time, provided for judicial review of VA benefits decisions. The legislative history of the VJRA makes clear that Congress regarded review in the Veterans Court as an appeal—not a new civil action—and that it considered the time limit of Section 7266(a) to be a deadline governing the initiation of an appeal.

a. The initial Senate version of the VJRA would not have created the Veterans Court but would instead have

provided for review of Board decisions in district court. S. 11, 100th Cong., 1st Sess. § 302 (1987) (proposed 38 U.S.C. 4025); see S. Rep. No. 418, 100th Cong., 2d Sess. 6-7 (1988) (*Senate Report*). To obtain such review, a claimant would have been required to "commence[]" a "civil action" by filing a "complaint" within 180 days after receiving notice of an adverse Board decision. *Id.* at 7. In the next iteration of the bill, the reviewing court was changed from the district court to the court of appeals. *Id.* at 17. The Senate passed that version, 134 Cong. Rec. 17,479 (1988), and the bill then moved to the House, which introduced the Veterans Court, but as a replacement for the Board, H.R. 5288, 100th Cong., 2d Sess. § 5 (1988); see H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 5 (1988) (*House Report*). Under the House version, a veteran could obtain review of the Veterans Court's legal conclusions, though not its factual findings, by filing a "notice of appeal" with the Federal Circuit. H.R. 5288, § 5 (proposed 38 U.S.C. 4042(a)(1)(A)).

The compromise bill, which was eventually enacted, retained the Board and created the Veterans Court, with that court serving as the initial reviewer of decisions made by the Board. Under that compromise, a claimant can seek review in the Veterans Court not by "commenc[ing]" a civil action, but by filing a "notice of appeal * * * within 120 days" after the Board's decision. 38 U.S.C. 7266(a). A claimant may then seek review of an adverse Veterans Court decision—on legal, but not factual, issues—by filing a "notice of appeal" to the Federal Circuit. 38 U.S.C. 7292(a). In describing the compromise version of Section 7266, Senator Cranston, the chief sponsor of the VJRA, stated:

> In order to make an appeal to the [Veterans Court], an appellant would be required to file a notice of appeal with the court within 120 days after a final [Board] decision. * * * This is a slightly shorter time to take an appeal than that provided for in S. 11—180 days—but the amount of activity that would have to be accomplished to file the appeal under the compromise agreement is also reduced. Under S. 11, the appellant would have had to file a civil suit within the 180-day time period. Under the compromise agreement, the only action required is the filing of a notice of appeal.

134 Cong. Rec. at 31,470.

Those remarks reflect the chief sponsor's understanding that Section 7266(a) would not, as petitioner suggests (Br. 19), "establish[] the time limit for a veteran to *commence* a civil action against the Secretary." To the contrary, Senator Cranston's comments indicate that Congress chose the "notice of appeal" language in a deliberate effort to distinguish an appeal to the Veterans Court from the commencement of a civil action. Indeed, Congress chose the same language to describe the initiation of an appeal to the Veterans Court that it used to describe, in a subsequent section of the Act, the initiation of an appeal to the Federal Circuit.

b. The evolution of the Veterans Court's role in the successive legislative proposals that culminated in the VJRA further demonstrates that Congress viewed that court as equivalent to a federal court of appeals and therefore as subject to similar rules. As explained above, the initial version of the Senate bill called for review of Board decisions by district courts. In the next iteration of the bill, the courts of appeals replaced the

district courts. The primary reason for that change was "the view that judicial review under S. 11 is based solely on the record as developed at the [Board] and, as a result, there is no need for fact-finding, a function with which the Federal district courts have significant experience. Courts of appeals, on the other hand, have significant experience reviewing cases based on the record before them." *Senate Report* 70. Under the competing House version, in which the Veterans Court replaced the Board, that court's review of the decision of the VA regional office would have been de novo as to both factual and legal issues. See *House Report* 6.

In the compromise bill, the Veterans Court was designed to perform essentially the same role as the courts of appeals in the Senate version—that is, reviewing the agency's decision based on the record before the Board. 38 U.S.C. 7252(b). One of the few differences between the compromise bill and the Senate bill was the standard of review for factual issues. Senator Cranston explained that the Senate had adopted the "clearly erroneous" standard in the compromise bill because it is "the standard used by U.S. Courts of Appeals when they review factual determinations made in district court." 134 Cong. Rec. at 31,471; see *id.* at 31,788 (statement of Rep. Edwards) (same). That history reinforces the conclusion that Congress viewed the Veterans Court as an appellate court and intended the Veterans Court's procedures to mirror those of the federal courts of appeals.

c. The only explicit discussion in the legislative history of good-cause exceptions supports the conclusion that Section 7266(a)'s time limit is a jurisdictional deadline for the taking of an appeal. Under the House bill, a claimant was given 90 days to file an appeal with the Veterans Court, but that period could be "extended by

the Court for good cause shown." H.R. 5288, § 5 (proposed 38 U.S.C. 4015(d)(1)). That "good cause" exception does not appear in the statute as enacted. By contrast, Congress did include a good-cause exception in 38 U.S.C. 7105(d)(3), the statute prescribing the time limit for perfecting an appeal of a regional office decision to the Board, further indicating that its failure to include such an exception in Section 7266(a) was deliberate.

d. Since 1988, Congress has amended the VJRA, including Section 7266, on various occasions. Petitioner points out (Br. 29) that, during the period from 1998 until its en banc decision in this case, the Federal Circuit permitted equitable tolling of the time limit set out in Section 7266. In his view, the amendments to the statute must therefore have ratified the court of appeals' prior understanding that equitable tolling is available. That argument lacks merit.

As an initial matter, although the court of appeals held in 1998 that the deadline prescribed in Section 7266(a) is subject to equitable tolling, *Bailey* v. *West*, 160 F.3d 1360, 1362-1368 (Fed. Cir.) (en banc), earlier precedent had held that the deadline was *not* subject to tolling, see *Butler* v. *Derwinski*, 960 F.2d 139, 140-141 (Fed. Cir. 1992); *Dudley* v. *Derwinski*, 2 Vet. App. 602, 603 (1992) (en banc). In 1994, Congress amended Section 7266 without overturning those decisions. Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 511, 108 Stat. 4670. On petitioner's theory, the inference that Congress ratified the pre-1998 case law precluding tolling is at least as compelling as the argument that later amendments ratified the post-1998 case law permitting tolling.

In any event, although Congress may be presumed to adopt a settled judicial interpretation of a statute when

it "re-enacts a statute without change," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), here Congress did not reenact the language of Section 7266(a) but simply modified the statute in ways that are not relevant to the question presented here. Nor is the other "requirement[] for congressional ratification" satisfied in this case, because "the supposed judicial consensus [was not] so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it." *Jama* v. *ICE*, 543 U.S. 335, 349 (2005). On the contrary, the interpretation that petitioner believes Congress ratified was embodied only in a divided decision of a lower court, a decision that was contrary to the precedents on which this Court relied in *Bowles*. See *Bailey*, 160 F.3d at 1371-1372 (Bryson, J., dissenting). As the en banc court of appeals explained in its decision below, "it would be inappropriate to rely on congressional 'silence' to find approval of [petitioner's] position * * * when the Supreme Court itself has characterized its precedent as having 'long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature.'" Pet. App. 32a (quoting *Bowles*, 551 U.S. at 206) (emphasis omitted).

C. The Rule Recognized In *Bowles* Applies To This Case

Petitioner identifies various characteristics of Section 7266(a) and the Veterans Court that, in his view, make the rule reaffirmed in *Bowles* inapplicable. He points out that Section 7266(a) is a provision separate from other statutes defining the Veterans Court's jurisdiction, that the provision refers to the actions of litigants rather than the court, and that the Veterans Court is an Article I rather than an Article III court. None of those observations undermines the conclusion that Sec-

tion 7266(a)'s time limit on the initiation of appeals in the Veterans Court is jurisdictional.

1. Petitioner observes (Br. 21) that the time limit imposed by Section 7266(a) is contained in a provision separate from 38 U.S.C. 7252(a), which gives the Veterans Court "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." Petitioner suggests (Br. 22) that a statutory time limit for taking an appeal is not jurisdictional if it appears in a provision separate from the statute conferring jurisdiction on the appellate court. That suggestion is refuted by *Bowles*, in which the Court held that 28 U.S.C. 2107, the statute specifying the deadline for appeals in civil cases, imposes a jurisdictional requirement, even though that provision does not even appear in the same chapter of Title 28 as 28 U.S.C. 1291, which authorizes courts of appeals to review the final judgments of district courts. As the Court explained, "[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." 551 U.S. at 210 (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003)) (brackets in original).

Petitioner identifies (Br. 21) various cases in which the Court considered whether a statutory requirement was contained in the same statute as the underlying jurisdictional grant. But in all of those cases, the location of the requirement was merely one of several factors the Court considered in determining whether the relevant provision was jurisdictional. See *Reed Elsevier*, 130 S. Ct. at 1245-1247; *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 (2006); *Zipes*, 455 U.S. at 393. More importantly, none of the cases involved a statute imposing a time limit on the initiation of an appeal. As *Bowles* makes clear, the location of the statute, by itself, is not

determinative. What matters is "the type of limitation" at issue, and when the limitation is a "statutory deadline[] for filing appeals," it is treated as jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1248.

2. Petitioner also asserts (Br. 20) that Section 7266(a) is not jurisdictional because it is addressed to "the litigant rather than the court" in that it requires the "person adversely affected by [the] decision" of the Board to "file a notice of appeal" within 120 days. The Court in *Bowles* did not suggest, however, that a statutory deadline for the initiation of an appeal can be treated as nonjurisdictional simply because it is phrased as a directive to the litigant rather than to the court. To the contrary, the *Bowles* Court recognized that the time limit for filing a petition for a writ of certiorari in a civil case is jurisdictional, 551 U.S. at 211-212; see *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 90 (1994), even though the statute imposing that limit is addressed to litigants, instructing that "any writ of certiorari * * * shall be * * * applied for within ninety days" of the judgment. 28 U.S.C. 2101(c). Similarly, this Court has held that the time limit for seeking review of an order of deportation is jurisdictional, but the statute imposing that limit similarly refers to the timing of the petition, not the authority of the court. See *Stone*, 514 U.S. at 406; 8 U.S.C. 1105a(a)(1) (Supp. V 1993) (stating that a petition for review "may be filed not later than 90 days after the date of the issuance of the final deportation order"); see also 8 U.S.C. 1252(b)(1) (current version of the time limit, stating that "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal"). Petitioner identifies no decision of this Court holding that a statute limiting the

time for taking an appeal was not jurisdictional, no matter how the limitation was phrased.

3. Finally, petitioner observes (Br. 38-39) that the Veterans Court was created under Article I, rather than Article III, of the Constitution. That is hardly a basis for adopting a more expansive interpretation of that court's jurisdiction. To the contrary, the inherent equitable authority of Article I courts is *more* limited than that of Article III courts, and the rule that "it is for Congress to determine the subject-matter jurisdiction of federal courts" therefore "applies with added force to Article I tribunals." *United States* v. *Denedo*, 129 S. Ct. 2213, 2221 (2009). See *United States* v. *Rodriguez*, 67 M.J. 110, 114-115 (C.A.A.F.), cert. denied, 130 S. Ct. 459 (2009) (applying *Bowles* to conclude that the statutory time limit for filing an appeal to the United States Court of Appeals for the Armed Forces, an Article I appellate court, is jurisdictional); cf. *John R. Sand & Gravel Co.*, 552 U.S. at 133-139 (holding that, although most limitations periods for commencing suit are subject to waiver or forfeiture, the six-year deadline for filing suit in the Court of Federal Claims is not). Petitioner cites no contrary authority.

D. The Pro-Veteran Orientation Of The VA Adjudication System Does Not Support Petitioner's View That The Deadline Prescribed By Section 7266(a) Is Subject To Equitable Tolling

1. As this Court has observed, the VA's administrative claims-adjudication process is nonadversarial and is "designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). Judicial review in the Veterans Court, how-

ever, follows the traditional adversarial model of appellate litigation. *Forshey*, 284 F.3d at 1355. The unique nature of the VA adjudication system therefore provides no basis for deviating from the general rule that statutory deadlines for the taking of appeals are jurisdictional.

Just last year, this Court rejected the specialized framework devised by the Federal Circuit for resolving harmless-error questions in appeals to the Veterans Court. *Sanders*, 129 S. Ct. at 1704-1706. The Court held that the statutory command to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2), required the Veterans Court "to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases," 129 S. Ct. at 1704. In other cases as well, this Court has disapproved the Federal Circuit's creation of special rules applicable to cases within its specialized subject-matter jurisdiction, and it has directed that court to apply rules of general applicability consistent with the precedents of this Court and the regional circuits. See, *e.g.*, *eBay, Inc.*, v. *MercExchange, L.L.C.*, 547 U.S. 388, 391-394 (2006); *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832-834 (2002).

In this case, the court of appeals appropriately took account of *Sanders* in reconsidering its pre-*Bowles* decisions permitting equitable tolling of the appeal period prescribed in Section 7266(a). The court observed that it had "recently been reminded by the Supreme Court that, although 'Congress has expressed special solicitude for the veterans' cause,' we do not have free rein to establish special procedural schemes governing the veterans' system alone." Pet. App. 41a (quoting *Sanders*, 129 S. Ct. at 1707). While recognizing that "the veter-

ans' system is unique," the court was properly "wary of hinging different procedural frameworks solely on the special nature of that system." *Id.* at 42a.

2. Emphasizing Congress's "special solicitude for the veterans' cause," *Sanders*, 129 S. Ct. at 1707, petitioner argues (Br. 29) that this Court should apply a "pro-veteran canon of statutory construction" in interpreting Section 7266(a). But that canon provides that "interpretive *doubt* is to be resolved in the veteran's favor," and it therefore has no application in the absence of statutory ambiguity. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (emphasis added). In light of the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional," there is no such ambiguity here. *Bowles*, 551 U.S. at 210.

3. Petitioner suggests (Br. 24) that a jurisdictional time limit for appealing Board decisions to the Veterans Court would be anomalous because it "would be an anti-veteran rule within an otherwise pro-veteran scheme." He also observes (Br. 37) that there is "[n]o [s]ettled [t]radition" of jurisdictional time limits on appeals by veterans. But until 1988, VA decisions were not subject to judicial review at all. Since a total preclusion of judicial review coexisted for years with the "pro-veteran" administrative scheme, there is no reason why jurisdictionally limited review should be inconsistent with that regime. *See Senate Report* 30-31 (explaining that the decision to provide review was "not based on a belief that the current preclusion of judicial review * * * result[ed] in wide-spread injustices"); *see also id.* at 49-50.

Petitioner's argument also overlooks that Section 7266(a) establishes an unusually long (120-day) time period for filing a notice of appeal. That period is longer

than the period for taking an appeal in a civil case, 28 U.S.C. 2107 (30 days, or 60 days if the government is a party), for petitioning for review of an agency's decision under the Hobbs Act, 28 U.S.C. 2344 (60 days), or for petitioning for a writ of certiorari in a civil case, 28 U.S.C. 2101 (90 days). Thus, to the extent that some veterans may have greater difficulty than other litigants in promptly seeking appellate review, Congress responded to that concern by providing an unusually long filing deadline, not by making the deadline nonjurisdictional. Cf. *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998) (relying on "the unusually generous nature" of the limitations period governing the Quiet Title Act, 28 U.S.C. 2409a, as a basis for concluding that "extension of the statutory period by additional equitable tolling would be unwarranted").

E. Petitioner's Policy Arguments Do Not Justify Treating Section 7266(a)'s 120-Day Deadline As Nonjurisdictional

Petitioner argues that application of the jurisdictional time limit of Section 7266(a) will lead to harsh results. He states that veterans "prevail in roughly 80 percent of cases decided by the Veterans Court on the merits, and have been awarded attorneys' fees in more than 50 percent of cases." Br. 27 (emphasis omitted). He also points out (Br. 26) that many veterans are not represented by attorneys before the Board. He concludes that, under the decision below, "those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Br. 25 (quoting Pet. App. 46a (Mayer, J., dissenting)). Petitioner's arguments are more appropriately directed to Congress than to this Court. See *Lamie* v. *United States Tr.*, 540 U.S. 526, 538 (2004) ("Our unwillingness

to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is long-standing."); *Locke*, 471 U.S. at 101. In any event, his policy concerns are overstated.

1. Petitioner's assertion that appellants prevail in 80% of the cases decided by the Veterans Court "on the merits" is technically accurate but incomplete. Of the 4379 cases decided by the Veterans Court in fiscal year 2009 (when equitable tolling was available), 1109 (approximately 25%) were dismissed, many for default but others for lack of jurisdiction or as a result of a voluntary dismissal. United States Court of Appeals for Veterans Claims, *Annual Reports*, http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf. In 1758 of the remaining cases, the court granted a joint motion to remand. *Ibid.*; see James D. Ridgway, *Why So Many Remands? A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 Veterans L. Rev. 113, 152 (2009) (*Ridgway*). Although such remands are identified as "merits decisions" in the court's annual reports, they generally involve no decisionmaking by the Veterans Court, and the parties' joint motions may be predicated on changes in law or procedural grounds involving no concession of error by the VA.

Of the 1464 cases in which the Veterans Court actually decided the merits, it affirmed in 571 cases (39%), affirmed in part and reversed in part in another 496 cases (34%), and reversed and remanded in only 397 (27%). *Annual Reports*. Moreover, in the great majority of cases in which the court ordered a remand, it did so for the purpose of requiring additional explanation for the Board's decision or of providing additional proce-

dures. The remand rate therefore does not imply that claimants who fail to preserve their appeal rights are routinely being deprived of benefits to which they are entitled. Cf. *Ridgway* 165 ("Much of the debate since the creation of the [Veterans Court] has been premised on the belief that the outcomes of the court's appeals are highly unusual, but this turns out to be unsubstantiated by an empirical analysis.").

Similarly, the high rate of fee awards in veterans' appeals does not indicate that the VA has taken unjustified positions in a disproportionate number of its administrative decisions. Rather, it results from the VA's practice of agreeing to procedural remands and from the Veterans Court's unique jurisprudence regarding the payment of fees under the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325. The Federal Circuit has held that virtually any type of remand from the Veterans Court will confer "prevailing party" status, and the Veterans Court has taken a very liberal approach to the "substantial justification" requirement, finding that nearly any procedural error can establish a lack of substantial justification. *Kelly* v. *Nicholson*, 463 F.3d 1349, 1353 (Fed. Cir. 2006) ("[W]here the plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party . . . without regard to the outcome of the agency proceedings.") (quoting *Former Employees of Motorola Ceramic Prods.* v. *United States*, 336 F.3d 1360, 1366 (Fed. Cir. 2003)); see *Cullens* v. *Gober*, 14 Vet. App. 234, 251 (2001) (en banc) (Holdaway, J., dissenting) ("No other court in the country awards EAJA fees as liberally as this one. * * * [N]o other federal court awards EAJA

fees when an agency fails to appropriately articulate reasons for its administrative decision.").

2. Petitioner is correct that only about eight percent of veterans are represented by attorneys when they appear before the Board. That does not mean, however, that veterans lack any assistance in Board proceedings. In fact, more than 80% of veterans appearing before the Board have non-attorney representatives from service organizations such as Disabled American Veterans or the American Legion. Board of Veterans Appeals, *Report of the Chairman: Fiscal Year 2009*, at 21 (2010), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf. Those representatives must meet VA training and certification requirements, see 38 C.F.R. 14.629(a), and they help veterans to present their claims to the VA and can also inform them about their appeal rights.

In addition, when the Board issues a decision, it is required by statute to "provide to the claimant * * * notice of such decision" on "a timely basis," and that notice must "include an explanation of the procedure for obtaining review of the decision." 38 U.S.C. 5104(a). The VA complies with the statute by mailing its decisions to claimants together with a copy of VA Form 4597, *Your Rights To Appeal Our Decision* (Aug. 2009), http://www4.va.gov/vaforms/va/pdf/VA4597.pdf. That form is a two-page document that explains, *inter alia*, the claimant's right to "[a]ppeal to the United States Court of Appeals for Veterans Claims." *Ibid.* A section entitled "How long do I have to start my appeal to the Court?" informs claimants:

> You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. * * *

> You should know that * * * *it is your responsibility to make sure that your appeal to the Court is filed on time.*

Ibid. The next section—entitled "How do I appeal to the United States Court of Appeals for Veterans Claims?"—advises claimants to send a notice of appeal directly to the Veterans Court, provides the court's address, and refers claimants to the court's website for "information about the Notice of Appeal [and] the procedure for filing a Notice of Appeal." *Ibid.* It then reiterates that "you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office." *Ibid.* The form also provides websites and a phone number for finding service organizations or pro bono attorneys. *Ibid.* Thus, the VA tries to ensure that claimants are informed of the deadline imposed by Section 7266(a) and of what they must do to meet it.

3. Petitioner's arguments also overlook other features of the VA adjudication scheme that further increase the likelihood that eligible veterans will receive the benefits to which they are entitled. Even after an adverse final decision by the Veterans Court—or an adverse final Board decision that is not timely appealed—a veteran may pursue a number of remedies to obtain benefits. A veteran may request reopening of a previously denied claim by submitting "new and material evidence" to the VA. 38 U.S.C. 5108; see 38 C.F.R. 3.156(a) (stating that, to be "material," new evidence need only "relate[] to an unestablished fact necessary to substantiate the claim" and "raise a reasonable possibility of substantiating the claim"). In addition, a veteran may seek collateral review of a final regional office or Board decision by requesting review for "clear and unmistakable error," 38 U.S.C. 5109A and 7111, or may at any time re-

quest that the Board reconsider its decision, 38 U.S.C. 7103. Successful invocation of any of those mechanisms may provide the same relief as a successful appeal to the Veterans Court. Thus, the VA adjudication scheme provides claimants with multiple opportunities to obtain any benefits to which they are entitled.

4. As this Court has explained, if "rigorous" jurisdictional rules "are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits." *Bowles*, 551 U.S. at 214. With that principle in mind, the VA has urged Congress to permit the Veterans Court, upon a showing of good cause, to extend the appeal period for up to 120 days from the expiration of the original period. See Letter to Nancy Pelosi, Speaker of the House of Representatives, from Eric K. Shinseki, Secretary of Veterans Affairs (May 26, 2010) (transmitting the VA's proposed "Veterans Benefit Programs Improvement Act of 2010," including Section 209, "Good cause extension of the period for filing a notice of appeal with the Court of Appeals for Veterans Claims"). Br. in Opp. App. 1a-6a. A bill with a provision similar to the VA's proposal has been introduced in the Senate. S. 3517, 111th Cong., 2d Sess. § 212 (2010). If enacted, that bill "would ameliorate harsh results in extreme circumstances" but "would not unduly undermine the finality of Board decisions, which is necessary for efficient administrative functioning." *Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 111th Cong. (July 1, 2010) (statement of Thomas J. Pamperin, Associate Deputy Under Sec'y for Policy and Program Mgmt., Veterans Benefits Admin., United States Dep't of Veterans Affairs).

The VA has urged the enactment of such a proposal because it believes that the decision below gives rise to some potential for unfair results in cases where circumstances beyond a veteran's control prevent him or her from filing a timely notice of appeal. There is no basis, however, for judicial creation of an open-ended exception to the time limit under the doctrine of equitable tolling. Unless Congress acts to amend the statute, the courts have "no authority to create equitable exceptions to jurisdictional requirements" like that prescribed in Section 7266(a). *Bowles*, 551 U.S. at 214.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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No. 09-1036

IN THE

Supreme Court of the United States

DORETHA H. HENDERSON,
AUTHORIZED REPRESENTATIVE OF
DAVID L. HENDERSON, DECEASED,
Petitioner,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF

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390:67

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
A. *Bowles* Does Not Bear The Dispositive Weight The Government Places On It	4
B. The Text And Structure Of Section 7266(a) Refute A Jurisdictional Reading	10
C. Section 7266(a)'s History And Purpose Refute A Jurisdictional Reading	13
D. The Pro-Veteran Canon Of Statutory Construction Applies In This Case	16
E. The Possibility That Congress May Overrule The Decision Below Is No Reason To Affirm	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page(s)
Arbaugh v. Y&H Corp., 546 U.S. 500 (2006)	12
Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003)	12
Bowen v. City of New York, 476 U.S. 467 (1986)	5, 9
Bowles v. Russell, 551 U.S. 205 (2007)	*passim*
Brown v. Gardner, 513 U.S. 115 (1994)	16
Dolan v. U.S. Postal Serv., 546 U.S. 481 (2006)	17
Gomez-Perez v. Potter, 553 U.S. 474 (2008)	15
Griggs v. Provident Consumer Disc. Co., 459 U.S. 56 (1982)	8
Johnson v. United States, 130 S. Ct. 1265 (2010)	11
Mathews v. Eldridge, 424 U.S. 319 (1976)	5
Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010)	3, 5, 10, 12
Shinseki v. Sanders, 129 S. Ct. 1696 (2009)	17, 18
Sims v. Apfel, 530 U.S. 103 (2000)	6
Stone v. INS, 514 U.S. 386 (1995)	9, 18

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Brockamp,
519 U.S. 347 (1997) 16

Weinberger v. Salfi,
422 U.S. 749 (1975) 5

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 12

STATUTES AND RULES

8 U.S.C. § 1105a(a)(1) (1993) 10

28 U.S.C. § 2101 ..... 5, 13

28 U.S.C. § 2101(c) 10, 12, 15

28 U.S.C. § 2107 ..... 2, 5, 13, 15

28 U.S.C. § 2107(c) 12

38 U.S.C. § 211(a) (1982) 16

38 U.S.C. § 5108 20

38 U.S.C. § 5109A 20

38 U.S.C. § 7104 11

38 U.S.C. § 7104(c) 20

38 U.S.C. § 7105 11

38 U.S.C. § 7105(d)(3) 15

38 U.S.C. § 7106 11

38 U.S.C. § 7107 11

38 U.S.C. § 7108 11

38 U.S.C. § 7111 20

38 U.S.C. ch. 72, subch. I 11

38 U.S.C. ch. 72, subch. II 11

TABLE OF AUTHORITIES—Continued

Page(s)

38 U.S.C. § 7252(a) 11

38 U.S.C. § 7261(a)(1)-(3) 20

38 U.S.C. § 7266(a) ..... *passim*

42 U.S.C. § 405(g) 7, 8, 15

Pub. L. No. 87-666, 76 Stat. 553 (1962) 15

Fed. R. App. P. 4(a) 8

Fed. R. App. P. 4(b) 15

Fed. R. App. P. 4(d) 12

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p. 31,459 13

p. 31,460 13

p. 31,466 14

p. 31,470 14

p. 31,479 15

Brief for the United States as *Amicus Curiae*, *Reed Elsevier*, 130 S. Ct. 1237 (No. 08-103) 10

H.R. 5064, 111th Cong. (2010) 21

H.R. 6132, 111th Cong. (2010) 21

Hearing Before Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs, 111th Cong. (July 1, 2010) 21-22

S. 3517, 111th Cong. (2010) 21

S. Rep. No. 100-418 (1988) 13

IN THE

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REPLY BRIEF*

The government implausibly submits that Congress intended to shut the courthouse doors to countless disabled veterans who miss Section 7266(a)'s 120-day deadline through no fault of their own. Echoing the majority below, the government argues that (1) statutory time limits for initiating an appeal are jurisdictional, U.S. Br. 6-13, 25-26; (2) this case involves an appeal, *id.* at 13-24; and, therefore (3) the deadline here is jurisdictional. That wooden syllogism is followed by the government's repeated

* David L. Henderson died on October 24, 2010. On November 15, 2010, this Court substituted Doretha H. Henderson, the authorized representative of Mr. Henderson, as petitioner.

statement that petitioner has not identified a decision of this Court that has treated as *non*-jurisdictional a statutory deadline for initiating review in an appellate court. *Id.* at 14-15, 18, 26-27.

The first problem with that position is that the government identifies no decision of this Court that has held that *all* statutory deadlines for an appeal are jurisdictional, even if the statutory text, structure, and history at issue indicate that the deadline is not jurisdictional; even if there is no longstanding tradition of treating that deadline as jurisdictional; even if the deadline does not involve a court-to-court appeal but represents the first time the litigant appears in court; even if the deadline follows a pro-claimant, non-adversarial administrative scheme; even if the deadline looks, smells, feels, and acts like the *non*-jurisdictional deadline in the social security disability context; even if a pro-veteran canon of statutory construction resolves ambiguity in favor of the veteran; even if the result would bar disabled soldiers who have risked their lives for the Nation from access to any judicial review; and even if the government urges that Congress should and likely would overrule the decision below if this Court does not.

Another problem with the government's position is that this case is about 38 U.S.C. § 7266(a). Yet the government's reasoning is glued to *Bowles v. Russell*, 551 U.S. 205 (2007), as if that decision were a statute. But *Bowles*, a case decided two decades after the enactment of Section 7266(a), sets forth the rule for a deadline under an unrelated provision of the U.S. Code, 28 U.S.C. § 2107. *Bowles* also relies on a century of jurisprudence that treated appeals under Section 2107 and other deadlines for *court-to-court*

appeals as jurisdictional. *Bowles* does not purport to create a blanket, all-encompassing rule regardless of context. "*Bowles* stands for the proposition that context . . . is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1247-48 (2010). The relevant starting and ending point in this case is Section 7266(a), and that provision's text, structure, and history refute that Congress intended the 120-day deadline to limit the Veterans Court's jurisdiction.

Yet another problem with the government's position is that it is unfathomable Congress intended to impose an inflexible jurisdictional bar on veterans who seek benefits from disabilities resulting from their military service, who are typically unrepresented by counsel, and who may miss the deadline because of the very disabilities for which they seek benefits. Congress could not have intended to treat the Nation's veterans worse than criminals whose appeal deadline is not jurisdictional; worse than social security disability claimants whose appeal deadline is not jurisdictional; and worse than general litigants whose appeal deadline *is* jurisdictional but can be extended by the district court and whose mistaken filing in the wrong forum does not bar access to judicial review. Those anomalous results alone create the kind of ambiguity that triggers the pro-veteran canon of statutory construction.

The tragic consequences that would result from the decision below highlight the final problem with the government's position. Many veterans have debilitating mental and physical disabilities that prevent them from filing a timely notice of appeal in the Veterans Court. The VA's bureaucracy is marred by extraordinary delay, by a shocking rate of erroneous

disability benefit denials, and by the VA's routinely failing to advise a veteran until after the expiration of the 120-day deadline that the veteran mistakenly filed the notice of appeal with the VA instead of the Veterans Court. The government calls those considerations "overstated," U.S. Br. 8, but fails to even acknowledge the *amici* briefs filed by six eminent veteran organizations that represent millions of veterans and their families. These organizations have expressed the view that the Federal Circuit's decision would have devastating effects on the most severely disabled veterans and their families who have made the greatest of sacrifices to preserve the Nation's security and its most sacred values.

The government responds that "policy arguments" should be directed at Congress and not this Court. *Id.* at 30. But if the result of a lower court's statutory interpretation would depart so far from what the legislature could have intended, and the statutory language, structure, and history do not come close to compelling the arbitrary and tragic results that would flow from that interpretation, perhaps the lower court's decision is just wrong.

A. *Bowles* Does Not Bear The Dispositive Weight The Government Places On It

1. The government devotes most of its brief to arguing that this case involves an appeal. U.S. Br. 13-24. The relevant issue, however, is not whether Section 7266(a) specifies a time limit for an appeal, but whether the government can point to clear congressional intent to treat Section 7266(a) as jurisdictional. Pet. Br. 17-30. Absent such showing, the provision is not jurisdictional. *Id.* at 18-19.

Instead of showing Congress intended in Section 7266(a) to impose an unyielding jurisdictional deadline, the government tries to extract a categorical principle from *Bowles* that any deadline to file an appeal—regardless of statutory language, history, or context—is jurisdictional. *Bowles* does not "hold that all statutory conditions imposing a time limit should be considered jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1247. *Bowles* construes a particular statute that governs court-to-court civil appeals, 28 U.S.C. § 2107, and *all* of the historic precedents discussed in *Bowles* involve court-to-court civil appeals. *Bowles*, 551 U.S. at 209-10; Pet. Br. 37-38. A non-jurisdictional reading of Section 2107 would have repudiated "a century's worth of precedent and practice in American courts." *Bowles*, 551 U.S. at 209 n.2.

Here, the most relevant analog is a *non*-jurisdictional one. When Congress passed Section 7266(a), this Court repeatedly had held that the statutory deadline for a social security disability claimant to seek judicial review of an agency's denial of benefits is *not* jurisdictional and is subject to equitable tolling. Pet. Br. 30-31, 38 (discussing *Bowen v. City of New York*, 476 U.S. 467 (1986), *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Weinberger v. Salfi*, 422 U.S. 749 (1975)).

Bowles does not mention those decisions because *Bowles* does not address any statutory deadline for an appeal of agency action. To the extent that *Bowles* discusses an appeal other than one under Section 2107 or a petition for a writ of certiorari under 28 U.S.C. § 2101, *Bowles* observed that an appeal in a criminal case is *not* jurisdictional. 551 U.S. at 212. *Bowles* may establish a categorical rule for statutory deadlines with respect to Article III court-to-court

appeals in civil cases, but there is no justification for reading *Bowles* to establish a categorical rule that applies to the unique veterans context presented here.

2. The government also ignores the principle recognized in *Sims v. Apfel*, 530 U.S. 103, 110 (2000), that the relationship of lower courts to upper courts should not be reflexively equated to the relationship of administrative bodies to a reviewing court. The government thus disregards all the ways in which a proceeding before the Veterans Court fundamentally differs from the court-to-court context and all the ways in which the proceeding is functionally identical to a social security disability claimant's appeal of an agency's denial of disability benefits in a district court.

A Board-to-Veterans Court proceeding differs from the court-to-court context in that:

- The proceeding before the Board is unusually pro-claimant, *ex parte*, and exceedingly informal;
- The proceeding before the Board is non-adversarial;
- The proceeding in the Veterans Court is the first time that the veteran appears in a judicial forum;
- The proceeding in the Veterans Court is the first time that the veteran and the Secretary are adversaries; and
- The proceeding in the Veterans Court is subject to a court-to-court appeal to the Federal Circuit.

Pet. Br. 40-43.

The government also misperceives the implications of the status of the Veterans Court as an Article I court. U.S. Br. 27. The rule recognized in *Bowles* is driven in part by the separation-of-powers concerns implicated when Article III courts enlarge their own jurisdiction. *Bowles*, 551 U.S. at 212-13; Pet. Br. 38-39; Brief of Allan G. Halseth as *Amicus Curiae* ("Halseth Br.") 28-30. A non-jurisdictional reading of Section 7266(a) does not expand the power of the judiciary contrary to congressional intent. Rather, a non-jurisdictional reading would ensure that the Veterans Court is available for the reason that Congress created it: to give veterans their day in court.

The government also does not dispute that the Veterans Court proceeding is functionally identical to the social security context under 42 U.S.C. § 405(g) in that:

- Section 405(g), like Section 7266(a), sets forth the time limit for disability claimants to seek judicial review of the agency's denial of disability benefits;
- The district court under Section 405(g), like the Veterans Court, performs an *appellate* function under a deferential standard of review based on the administrative record;
- The social security scheme, like the veterans scheme, is non-adversarial and unusually pro-claimant; and
- A timely filing under Section 405(g) transfers jurisdiction from the agency to the court.

Pet. Br. 30-33, 47-48.

The government observes that a social security claimant files a "complaint" rather than a "notice of appeal." U.S. Br. 17. The government does not explain why, however, that difference should matter. The two are functionally equivalent in initiating suit for the first time against the agency in a court that then performs an appellate function based on the record before the agency.

3. The government also relies on this Court's statement in *Griggs v. Provident Consumer Disc. Co.* that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." 459 U.S. 56, 58 (1982) (per curiam); *see* U.S. Br. 11. But *Griggs* was discussing Federal Rule of Appellate Procedure 4(a) and thus a court-to-court appeal. In any event, the *Griggs* sentence cannot be interpreted to mean all appeal deadlines are jurisdictional. As the government does not contest, a timely challenge to a denial of social security disability benefits under 42 U.S.C. § 405(g) divests the agency of jurisdiction over the claimant's case and transfers jurisdiction to the district court, Pet. Br. 48, and that statutory deadline nonetheless is subject to equitable tolling.

The government's transfer-of-jurisdiction principle, moreover, reflects the rule that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Griggs*, 459 U.S. at 58. That rule does not address whether the *deadline* for transferring an action from the agency to a court is itself jurisdictional. If Section 7266(a) sets forth a deadline that may be equitably tolled, the filing of the notice of

appeal still marks the point at which the Veterans Court acquires jurisdiction over the case.

4. The government also relies on the fact that the Veterans Court *exclusively* hears appeals. The government thus equates the deadline in Section 7266(a) with the jurisdictional deadline at issue in *Stone v. INS*, 514 U.S. 386 (1995), for a convicted alien to file a petition for review of an immigration removal order in a circuit court of appeals. U.S. Br. 18. Thus, the government submits that "[t]aken together," *Bowen*, *Bowles*, and *Stone* "make clear" that the time limit for seeking judicial review of agency action in *district court* is presumptively non-jurisdictional, while the time limit for an appeal and for seeking judicial review of agency action in any type of *appellate court* is jurisdictional. *Id.*

That gerrymandering of precedent ignores what this Court's cases actually hold and implausibly assumes Congress intended to treat a disabled veteran more harshly than a social security claimant who appeals a disability benefit denial and more like the convicted alien who challenges a removal order following a highly adversarial administrative proceeding. *Bowen*, *Bowles*, and *Stone* are not based on some overarching one-size-fits-all rule. Rather, each of those decisions construes congressional intent in light of the specific statutory context at issue. Pet. Br. 49-51 (discussing *Stone*).

Section 7266(a) involves a particular statutory context that does not remotely resemble the judicial review schemes at issue in *Bowles* and *Stone*. A non-jurisdictional reading of Section 7266(a) accordingly does not, as the government suggests, U.S. Br. 18, undermine the principle of *Bowles* or mean that all

deadlines for seeking initial judicial review of agency action are not jurisdictional. Context matters.

B. The Text And Structure Of Section 7266(a) Refute A Jurisdictional Reading

1. Section 7266(a)'s plain language does not purport to limit the Veterans Court's jurisdiction. Rather, Congress established a traditional limitations period for a veteran to challenge a final decision by the Secretary rejecting a veteran's claim for disability benefits. Pet. Br. 19-20.

That reading is supported by Section 7266(a)'s direction that the *veteran* take action within 120 days. The government responds that "*Bowles* did not suggest . . . that a statutory deadline for the initiation of an appeal can be treated as nonjurisdictional simply because it is phrased as a directive to the litigant rather than to the court." U.S. Br. 26. *Bowles*, however, did not instruct courts to ignore such an indication of legislative intent when it does exist. And the government itself urged that this factor distinguished the statute at issue in *Reed Elsevier* from the one in *Bowles*. Section 7266(a), like the statute in *Reed Elsevier*, "speaks to the obligations of the parties rather than the power of the court." Brief for the United States as *Amicus Curiae* 14-15, *Reed Elsevier*, 130 S. Ct. 1237 (No. 08-103); *see also* Halseth Br. 11-15.

The government cites two examples of jurisdictional deadlines that do not expressly limit the court's power to act. U.S. Br. 26 (citing 28 U.S.C. § 2101(c) and 8 U.S.C. § 1105a(a)(1) (Supp. V 1993)). Neither, however, mentions the litigant. Here, Section 7266(a) explicitly directs the deadline to the

veteran without purporting to restrict the Veterans Court's jurisdiction.

2. The government further argues that Section 7266(a)'s plain language mandates a jurisdictional reading because the veteran files a "notice of appeal." U.S. Br. 13 (quoting 38 U.S.C. § 7266(a)). This Court does "not assume that a statutory word is used as a term of art where that meaning does not fit." *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010). An appeal is not an inherently jurisdictional word. And in any event, even if the term "appeal" presumptively carries with it a jurisdictional meaning, that meaning does not fit the unique veterans context. Congress repeatedly used the terms "notice," "appeal," "appellate review," and "appellant" in a broader, *non-jurisdictional* sense to refer to a veteran's challenge of a VA regional office's denial of benefits before the Board. 38 U.S.C. §§ 7104-7108; Pet. Br. 45-46.

For the same reason, the government errs in relying on the phrase "notice of appeal" in the title of Section 7266(a). U.S. Br. 13. To the extent that titles matter, the title of the provision defining the Veterans Court's jurisdiction, Section 7252(a), is "*Jurisdiction*; finality of decisions." 38 U.S.C. § 7252(a) (emphasis added). Section 7252(a) is contained in a subchapter also entitled "Organization and Jurisdiction." 38 U.S.C. ch. 72, subch. I. And although Section 7252(a) cross-references provisions in other statutory sections, it does *not* refer to the 120-day deadline in Section 7266(a). *See* Pet. Br. 22. By contrast, Congress placed the 120-day deadline in a subchapter entitled "Procedure." 38 U.S.C. ch. 72, subch. II.

The government observes that the jurisdictional deadline in *Bowles* appears in a "provision separate

from the statute conferring jurisdiction on the appellate court." U.S. Br. 25. That observation merely shows that "some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants, *while others are not*." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003) (emphasis added and internal citations omitted). This Court often has held that the placement of a requirement in "an entirely separate provision" from the provision addressing the court's jurisdiction suggests that the requirement is not jurisdictional. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); *see also Reed Elsevier*, 130 S. Ct. at 1245-46; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006). The variation in outcomes only underscores that each statute must be judged on its own terms, not by some blanket rule applied devoid of all context.

3. The government's jurisdictional reading of the text assumes that Congress simultaneously created a right for disabled veterans to seek judicial review but eliminated that right when the very disability for which a veteran seeks benefits prevents the veteran from meeting the 120-day deadline. The government's reading defies common sense and "would produce no end of bizarre results" by treating the Nation's veterans more harshly than most litigants in our federal system. Brief of the Federal Circuit Bar Association as *Amicus Curiae* ("FCBA Br.") 10. In settings where time limits *are* jurisdictional, Congress typically includes language authorizing courts to extend the deadline for good cause, excusable neglect, or if a party lacks adequate notice of an adverse judgment. 28 U.S.C. §§ 2101(c), 2107(c). Federal Rule of Appellate Procedure 4(d) also treats a timely notice of appeal that is mistakenly filed in the

court of appeals as if it were correctly filed in the district court.

Under the Kafkaesque regime adopted below, Pet. App. 46a (Mayer, J., dissenting), a veteran would face stricter limits in filing his initial suit against the Secretary in Veterans Court than if he appeals an adverse Veterans Court decision to the Federal Circuit under 28 U.S.C. § 2107, or if he seeks review of the Federal Circuit's decision in this Court under 28 U.S.C. § 2101. Nothing in Section 7266(a)'s text or structure suggests that Congress intended to produce these anomalous results and to erect an unforgiving, rigid jurisdictional deadline at the first opportunity the veteran has to seek judicial review.

C. Section 7266(a)'s History And Purpose Refute A Jurisdictional Reading

1. The Veterans' Judicial Review Act's history shows that Congress intended to "finally provide veterans their day in court." 134 Cong. Rec. 31,459 (1988) (statement of Sen. Mitchell); *see also id.* at 31,460 ("It is time to open the courthouse doors to American's 28 million veterans and their families."); *id.* (statement of Sen. Matsunaga) ("[The bill] provides many veterans what they have been seeking all along: the opportunity for true judicial review of claims."). In short, the Act was designed to treat veterans with "compassion" and "fairness," and to provide them with "fundamental justice." S. Rep. No. 100-418, at 31, 50 (1988). The history provides no suggestion that Congress intended the 120-day deadline to restrict the Veterans Court's jurisdiction.

The government argues that the history of the Veterans' Judicial Review Act "makes clear that Congress regarded review in the Veterans Court as

an appeal." U.S. Br. 19. The government again focuses on the wrong question to reach its desired result. The question is not whether Congress intended review in the Veterans Court to constitute an "appeal," but whether Congress intended the 120-day deadline to be jurisdictional.

The floor statement of Senator Cranston relied upon by the government, U.S. Br. 21, reflects Congress's intent to *ease* the veteran's burden in seeking judicial review by allowing the veteran to file a form notice of appeal rather than a full complaint. 134 Cong. Rec. at 31,470 ("[T]he amount of activity that would have to be accomplished to file the appeal under the compromise agreement is also reduced."). The trade-off for a simpler form to initiate review was a shorter time limit (180 days reduced to 120 days), not the preclusion of judicial review if a veteran missed the deadline for reasons beyond his control. *Id.*

Nothing in Senator Cranston's statement suggests he, or any legislator, understood that the 120-day deadline would constitute a rigid jurisdictional rule. To the contrary, in the same floor statement, Senator Cranston stated that the Act would place veterans on equal footing with social security disability claimants. The Senator explained that the VA's disability benefits system is "directly analogous" to and "resemble[s] most closely" the social security disability scheme. 134 Cong. Rec. at 31,466.

The government's speculation over the meaning of Section 7266(a)—based on three bills never enacted—is likewise unavailing. U.S. Br. 19-23. The report reconciling the three bills refers to the original Senate bill, in which the veteran would "commence[]" a "civil action," as setting up a process for an

"Appeal." 134 Cong. Rec. at 31,479. The drafters of the compromise bill that became Section 7266(a) thus used the term "appeal" to describe a veteran's request for judicial review, not because that term carried with it any jurisdictional significance. Pet. Br. 45-46; FCBA Br. 22-24.

2. The government also observes that one of the bills had a good cause exception to the deadline, which was not included in Section 7266(a). U.S. Br. 23. The presence *vel non* of a good cause exception, however, has no independent jurisdictional significance. Some deadlines providing good cause extensions are jurisdictional, *see* 28 U.S.C. § 2107 (civil court-to-court appeals); 28 U.S.C. § 2101(c) (petition for a writ of certiorari), while others are not, *see* Fed. R. App. P. 4(b)(4) (criminal court-to-court appeals); 42 U.S.C. § 405(g) (permitting "such further time as the Commissioner of Social Security may allow").

Similarly without merit is the government's reliance on the good cause exception to the deadline for administrative appeals to the Board under Section 7105(d)(3). U.S. Br. 23. Congress passed Section 7105(d)(3) in 1962—*i.e.*, 26 years before it enacted Section 7266(a). Pub. L. No. 87-666, sec. 1, § 4005(d)(3), 76 Stat. 553, 553-54 (1962). Decisions of the 87th Congress hardly illuminate the intent of the 100th. *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (inclusion of language in one provision does not mean deliberate exclusion elsewhere when "the two relevant provisions were not considered or enacted together").

If anything, Congress's exclusion of any cause exception in Section 7266(a) reflects that Congress presumed that equitable tolling would apply and that a good cause exception was therefore unnecessary.

Cf. United States v. Brockamp, 519 U.S. 347, 350 (1997) ("Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception."). By contrast, the inference urged by the government presupposes that Congress intended to treat veterans more harshly than civil appellants, criminal appellants, and social security disability appellants. If Congress really intended to fashion a Draconian jurisdictional limit in 7266(a)—in the midst of an unequivocally pro-veteran statute—it presumably would have used express language as it had in the statute that the 1988 Act repealed. *See* 38 U.S.C. § 211(a) (1982) ("no . . . court of the United States shall have the power or jurisdiction to review any [VA benefits determination]"). At a minimum, Congress would have included *some* mechanism to allow an extension where manifest justice demanded it.

D. The Pro-Veteran Canon Of Statutory Construction Applies In This Case

1. As one of the *amici* aptly stated, "[t]he canon requiring courts to construe veterans statutes liberally and compassionately in favor of veterans reflects a principle almost as old as government and war—that the body politic for whom the soldier risks life and limb should exhibit a spirit of gratitude and generosity for those sacrifices." Halseth Br. 16-17. That principle manifests itself in the canon that any "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see* Pet. Br. 29-30.

The government sweeps the canon aside, arguing that any ambiguity is dispelled by "'the longstanding treatment of statutory time limits for taking an appeal as jurisdictional.'" U.S. Br. 29 (quoting

Bowles, 551 U.S. at 210). That argument, however, is erroneously premised on a non-existent rule that any deadline for an "appeal" is jurisdictional without regard to the actual statute at issue. This Court discerns Congress's intent by "reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis," *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006), not by a myopic focus on judicial precedent that interprets different statutes in different contexts.

Properly framed, the pro-veteran canon is triggered if this Court has any reason to doubt that Congress intended to foreclose all access to judicial review when a veteran misses the 120-day deadline through no fault of his own. Such reasons abound. The text of Section 7266(a) contains no language framing the time limit as a jurisdictional restriction on the Veterans Court. The deadline is not contained in the provision or subchapter of the Act that addresses the Veterans Court's jurisdiction. A jurisdictional reading would conflict with the Act's history and its paramount purpose to ensure that veterans have their day in court. And a jurisdictional reading would put disabled veterans in an inferior position to other litigants with no apparent purpose.

2. The government also argues that *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009), establishes that the pro-veteran canon does not justify the creation of "special rules" for veterans. U.S. Br. 28. That argument is again premised on the misassumption that all statutory appeal deadlines are jurisdictional, regardless of the statute at issue. There is nothing "special" about a non-jurisdictional reading of Section 7266(a) if this Court concludes that it is implausible

that Congress intended to bar, without exception, any judicial review by a veteran who misses the deadline through no fault of his own.

Moreover, unlike the "prejudicial error" provision at issue in *Sanders*, 129 S. Ct. at 1704, which was borrowed verbatim from, and hence intended to be interpreted coextensively with, the Administrative Procedure Act, Section 7266(a) is not comparably worded to an analogous jurisdictional deadline. Section 7266(a) neither looks nor functions like the statutes at issue in *Bowles* or *Stone*.

E. The Possibility That Congress May Overrule The Decision Below Is No Reason To Affirm

The government argues that Congress may overrule the decision below and notes that legislation has been proposed to that effect. U.S. Br. 35-36. These observations are hardly a basis for affirming an erroneous decision of a lower court.

1. As a threshold matter, the government states that the adverse consequences of a jurisdictional deadline are "overstated." U.S. Br. 8. That view, however, leaves some question as to why the government has urged Congress to overrule the decision below. *Id.* at 35.

In any event, the government does not mention, much less respond to, the *amici* briefs filed by six prominent veterans organizations representing disabled veterans and their families. Those briefs show that "hundreds of thousands" of veterans of past and present wars "have severe physical and mental disabilities that affect their ability to prosecute their claims and protect their rights." Brief for *Amici Curiae* Paralyzed Veterans of America *et al.*

("PVA Br.") 16; *accord* Brief *Amicus Curiae* of the America Legion ("AL Br.") 2-9; Brief of the *Amici Curiae* National Organization of Veterans' Advocates, Inc. *et al.* ("NOVA Br.") 6-9, 21-22; Brief of the National Veterans Legal Services Program as *Amicus Curiae* ("NVLSP Br.") 14-18.

Those briefs also show that the sustained military conflicts in Afghanistan and Iraq have led to a proliferation of claims for benefits that are critical to a veteran's transition from military to civilian life and to meeting the daily needs of veterans and their families. NOVA Br. 6-10; PVA Br. 8-10. And the briefs disturbingly show that the government all too often erroneously denies disability benefit claims after the veteran has spent years navigating the labyrinth of the VA bureaucracy. NOVA Br. 13; NVLSP Br. 10-12; *accord* Pet. Br. 43.

As to the startling statistic that veterans prevail in roughly 80% of cases decided by the Veterans Court on the merits, the government responds that the figure is "technically accurate." U.S. Br. 31. The government nonetheless parses the percentage by excluding certain remands to argue that the Board is wholly or partially reversed on the merits in only 61% of the cases. *Id.* Thus, even by the government's calculation, 6 in 10 veterans prevail in part when they seek relief in the Veterans Court. *See* NVLSP Br. 10-11 (analyzing statistics).

The government also observes that non-attorney representatives who assist veterans before the Board can "inform [veterans] about their appeal rights." U.S. Br. 33. But the government does not dispute that up to 70% of veterans, like Mr. Henderson, initiate proceedings before the Veterans Court unrepresented. Pet. Br. 8; PVA Br. 36; FCBA Br. 13;

NOVA Br. 18; *see* NVLSP Br. 19 (observing that many veterans assistance organizations "do not litigate in the Veterans Court"); Brief of *Amicus Curiae* United Spinal Association ("USA Br.") 8 & n.3 ("[O]f the 133 claimants whose cases have been dismissed as untimely filed since the Federal Circuit's decision, 109 were self-represented.").

Nor does the government contest that (1) notwithstanding any assistance veterans may receive before the Board and from the VA's form notices, veterans routinely *timely* file the notice of appeal but do so in the wrong forum; (2) the VA routinely does not notify the veteran of the misfiling until after the deadline has passed; and (3) on occasion the VA misinforms the veteran in the appeal process. Pet. Br. 25; PVA Br. 23-26; NOVA Br. 20, 22-23; FCBA Br. 14-16 & n.3; *see also* NVLSP Br. 19 ("It has been commonplace for veterans (even when assisted by service organizations) to file in the wrong venue.").

The importance of judicial review is not dissipated by existing administrative mechanisms for reopening, collateral attack, or Board reconsideration. U.S. Br. 34, 35. The first two procedures are subject to a threshold requirement of "new and material evidence," 38 U.S.C. § 5108, or "clear and unmistakable error," 38 U.S.C. §§ 5109A & 7111. Moreover, unlike the Veterans Court, the Board is powerless to diverge from VA regulations, Secretarial instructions, and General Counsel opinions on issues of law. *Compare* 38 U.S.C. § 7104(c), *with* 38 U.S.C. § 7261(a)(1)-(3). Thus, putting aside the years such proceedings could add to the veteran's effort to obtain benefits, *see* NOVA Br. 13, those alternatives are no substitute for the *de novo*, independent judicial

review that Congress intended to provide veterans when it created the Veterans Court.

2. The potentially tragic consequences of the Federal Circuit's decision are not, as the government argues, U.S. Br. 35, the result of the statute Congress enacted but the result of the Federal Circuit's over-reading of this Court's decision in *Bowles*. As discussed, the decision below applied a non-existent categorical rule as to when statutory deadlines are jurisdictional that makes no sense in light of the context of Section 7266(a).

Similarly, there is no reason to affirm the decision below based on the government's speculation that Congress may overrule the decision below. U.S. Br. 35-36. In any case involving statutory interpretation, Congress may address the question presented.

Moreover, the bill that the VA has proposed, U.S. Br. 35, would apply only prospectively and thus would not apply to petitioner or the hundreds of veterans already adversely affected by the lower court's rule. Cert. Reply 6; USA Br. 7 (noting dismissals based on decision below at "a rate of over three dismissals per week"). Likewise the Senate bill identified by the government, U.S. Br. 35, would only "apply with respect to notices of appeal filed on or after the date of the enactment of this Act." S. 3517, 111th Cong. § 212 (2010). And although the House has passed a bill containing a good cause exception that would apply retroactively, H.R. 6132, 111th Cong. § 4 (as passed by House, Sept. 28, 2010), the VA has opposed an identically worded bill, H.R. 5064, 111th Cong. (introduced Apr. 16, 2010), based, *inter alia*, on the bill's retroactivity. *See* Hearing Before Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs, 111th

Cong. (July 1, 2010) (statement of Thomas J. Pamperin, Associate Deputy Under Sec'y for Policy and Program Mgmt., Veterans Benefits Admin., United States Dep't of Veterans Affairs).

At bottom, the government's position that Congress could, should, and likely would overrule the outcome of the Federal Circuit's decision only prompts the question: could Congress have intended that outcome in the first instance?

CONCLUSION

Based on the foregoing reasons and the reasons stated in petitioner's opening brief, the decision below should be reversed.

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AMICUS CURIAE BRIEF

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On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN LEGION IN SUPPORT OF PETITIONER

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995

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. PTSD Is a Debilitating Illness That Strikes Military Veterans at Alarmingly High Rates. 4

II. PTSD May Prevent Affected Veterans from Filing Within the 120-day Window for Appeals of Decisions to the Veterans Court. 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Arbas v. Nicholson, 403 F.3d 1379 (Fed. Cir. 2005) 8

Barrett v. Principi, 363 F.3d 1316 (Fed. Cir. 2004) 8

Porter v. McCollum, 130 S. Ct. 447 (2009) 6, 9

STATUTES

38 U.S.C. § 7266(a) 2

OTHER AUTHORITIES

American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text revision, 2000) 5, 6

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Julie Pace, *Obama Pledges Help for Veterans to Address Post-Traumatic Stress*, Wash. Post, July 11, 2010, at A08 3

Jennifer L. Price, National Center for PTSD, *Findings from the National Vietnam Veterans' Readjustment Study, available at* http://www.ptsd.va.gov/professional/pages/vietnam-vets-study.asp (last visited Sept. 16, 2010) 7

Jaydip Sarkar *et al.*, *Comorbidity of Post Traumatic Stress Disorder and Paranoid Schizophrenia*, 16 J. Forensic Psychiatry & Psychol. 660 (2005) 4

Deborah Sontag & Lizette Alvarez, *In More Cases, Combat Trauma Is Taking the Stand*, N.Y. Times, Jan. 27, 2008, at 1 9

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INTEREST OF *AMICUS CURIAE*

Chartered and incorporated by Congress in 1919, The American Legion is a nonpartisan, not-for-profit organization that works on behalf of United States veterans regardless of war era or nature of service. Representing approximately 2.5 million wartime veterans and their families, it stands as the nation's largest veterans service organization.

One of the four pillars upon which The American Legion was founded is Veterans Affairs and Rehabilitation. Consistent with its core mission, The American Legion advocates for adequate funding of health care, timely access to health care facilities, fair rulings on benefit claims, and economic opportunities for veterans who have returned home shaped and sometimes changed by their military experiences.

Like the Petitioner, many veterans are affected by medical conditions directly linked to their military service. Veterans of recent military operations, such as Operation Iraqi Freedom and Operation Enduring Freedom, are all too often crippled by posttraumatic stress disorder ("PTSD"). The effects of this condition can be debilitating, and The American Legion works hard to ensure that affected men and

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

women have access to adequate care and compassionate treatment.

In holding that the time to file an appeal to the United States Court of Appeals for Veterans Claims ("Veterans Court") is jurisdictional and no longer subject to equitable tolling, the Federal Circuit has issued an opinion that significantly undermines this care and treatment. The Federal Circuit's decision will predictably and inexorably result in the denial of benefits to our veterans who are most in need, particularly those suffering from mental illnesses like PTSD that interfere with their ability to comply with time limits and deadlines. Accordingly, The American Legion has a strong interest in seeing that the decision of the Court of Appeals is rectified and reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The American Legion respectfully submits this brief to ensure that the Court has a clear, informed, and thorough understanding of how PTSD handicaps the ability of veterans to file appeals with the Veterans Court within the 120-day time limit established by statute. 38 U.S.C. § 7266(a). Adopting the rule set forth by the Federal Circuit would shutter the courthouse doors to veterans like David Henderson who may deserve federal assistance but failed to file a timely appeal because of emotional

and psychological disabilities directly attributable to military service.[2]

Petitioner Henderson began serving in the military in 1950. He was discharged in 1952 after being diagnosed with paranoid schizophrenia, which he established as related to his military service; he received a 100% disability rating. In 2001, without the assistance of counsel, Henderson applied for special compensation for in-home care to treat his service-related mental disability. The Department of Veterans Affairs ("VA") regional office denied his request, and this decision was affirmed by the Board of Veterans' Appeals.

According to his treating psychiatrist, Henderson is "incapable of rational thought or deliberate decision-making" and "incapable of understanding and meeting deadlines." Badawi Decl., ¶ 4 & Ex. A at 2 (Mar. 13, 2007) (Fed. Cir. JA at A1028, A1031). While PTSD was not clinically recognized as a diagnosis when Henderson was first diagnosed in 1950, Henderson's symptoms are consistent with

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[2] Indeed, such a rule runs counter to recent policy changes concerning benefits for veterans with PTSD. *See* Julie Pace, *Obama Pledges Help for Veterans to Address Post-Traumatic Stress*, Wash. Post, July 11, 2010, at A08 ("President Obama said Saturday that the government is taking 'a long overdue step' to aid veterans with post-traumatic stress disorder, making it easier for them receive federal benefits.").

those of veterans who today are diagnosed with PTSD.[3]

PTSD, which is now better understood and widely documented, literally affects hundreds of thousands of servicemen and women, and its effects on their lives can be debilitating. The daily functioning of veterans suffering from PTSD can be significantly impaired, and even with treatment they commonly miss deadlines as a direct consequence of their condition.

Our country has made a pledge, through its laws and in our communities, to care for its servicemen and women upon their return home. The American Legion urges the Court to follow settled law and honor this promise by protecting Petitioner and other veterans' access to judicial redress.

ARGUMENT

I. PTSD Is a Debilitating Illness That Strikes Military Veterans at Alarmingly High Rates.

The psychological and emotional toll of military service can endure long after tours of duty end and physical injuries heal.[4] The United States created

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[3] *See generally* Jaydip Sarkar *et al.*, *Comorbidity of Post Traumatic Stress Disorder and Paranoid Schizophrenia*, 16 J. Forensic Psychiatry & Psychol. 660 (2005).

[4] One in six troops returning from duty in Iraq suffered from anxiety, major depression, or PTSD according to a study published in the New England Journal of Medicine. Charles Hoge *et al.*, *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 New Eng. J. Med. 13 (2004).

"the first military hospital for the insane in 1863" to treat Civil War soldiers. Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 190/191 Mil. L. Rev. 67, 70 (2007). The federal government, however, only undertook its first intensive research study of posttraumatic illnesses once known as "shell shock" or "war neurosis" after the Vietnam War. This study eventually led in 1980 to the official diagnostic classification of PTSD and codification by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders (DSM-III).[5]

PTSD is a severe anxiety disorder that can develop after an extreme traumatic event that causes psychological trauma. The traumatic stressor may involve either "direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity," or indirectly "witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 463 (4th ed. text revision, 2000) ("DSM-IV-TR").

PTSD may be issued as the formal diagnosis only if the symptoms cause "clinically significant distress or impairment" of major domains of daily life, such as occupational activities, social relations, or other

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[5] Henderson's diagnosis therefore predated the clinical recognition of PTSD.

"important areas of functioning," and only if these effects last for over one month. *Id.*

To be clinically diagnosed with PTSD, a patient must have experienced "intense fear, helplessness, or horror" in response to a trauma and exhibit the following symptoms: "numbing of general responsiveness"; "persistent reexperiencing of the traumatic event"; "persistent avoidance of stimuli associated with the trauma"; and "persistent symptoms of increased arousal." *Id.* Patients often experience depression, sleep disorders, and nervousness. Some veterans suffering from PTSD experience "flashbacks" that force the individual to relive the combat trauma. U.S. Dep't of Veteran Affairs, *Understanding PTSD*, *available at* http://www.ptsd.va.gov/public/understanding_ptsd/booklet.pdf.

Veterans suffer from PTSD at an alarmingly high rate.[6] A study commissioned by Congress concluded that a significant number of Vietnam veterans have experienced psychological and emotional problems, which produced life-adjustment difficulties both at work and in their personal lives. Jennifer L. Price, National Center for PTSD, *Findings from the*

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[6] As this Court noted in *Porter v. McCollum*, "PTSD is not uncommon among veterans returning from combat." 130 S. Ct. 447, 451 n.4 (2009) (per curiam) (*citing Fiscal Year 2010 Budget for Veterans' Programs: Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. 63 (2009) (uncorrected copy) (testimony of Eric K. Shinseki, Secretary of Veterans Affairs (VA), reporting that approximately 23 percent of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD)).

National Vietnam Veterans' Readjustment Study, *available at* http://www.ptsd.va.gov/professional/pages/vietnam-vets-study.asp (last visited Sept. 16, 2010). With respect to more recent military operations, since 2001, over 227,000 veterans have received medical treatment through the VA for mental health issues; of that number, the VA is caring for over 130,000 servicemen and women suffering from PTSD.[7] It is estimated that about 770,000 veterans have been diagnosed with PTSD since 2001.[8]

II. PTSD May Prevent Affected Veterans from Filing Within the 120-day Window for Appeals of Decisions to the Veterans Court.

Veterans diagnosed with PTSD suffer significant impairment in their functional ability to perform at their jobs and in social settings. As the VA has explained, PTSD can substantially "disrupt" the lives of veterans, "making it hard to continue with . . . daily activities." National Center for PTSD, *available at* http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp (last visited Sept, 15, 2010). Hence, it comes as no surprise that some veterans fail to file appeals of final agency decisions by the Board of Veterans' Appeals in a timely fashion given their "diminished responsiveness to the external world." DSM-IV-TR at 464. In clinical terms, this is described as "psychic numbing" or "emotional

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[7] Brief of the *Amici Curiae* National Organization of Veterans' Advocates, Inc. *et al.*, at 4a (U.S. filed Mar. 26, 2010).

[8] *Id.* at 6a.

anesthesia." *Id.* Indeed, veterans seeking benefits for service-related disabilities may be especially averse to pursuing an appeal if denied assistance because those with PTSD "try to avoid situations . . . that trigger memories of the traumatic event" and "avoid talking or thinking about the event." National Center for PTSD, *Understanding PTSD*, at 4, *available at* http://www.ptsd.va.gov/public/understanding_ptsd/booklet.pdf.

The Federal Circuit's decision, if left in place, would bar all appeals in all cases brought outside of the 120-day window, no matter the circumstances. Pet. App. 33a-34a. Such a rule would turn a blind eye to the fact that the same disability for which a veteran seeks federal assistance might also prevent him or her from filing within 120 days of the benefit's denial.

In this case, Petitioner Henderson, even while suffering from paranoid schizophrenia, only missed the statutory deadline by two weeks, filing 135 days after notice was mailed. To uphold the Federal Circuit's decision would preclude any court from considering the circumstances of his delayed appeal and reviewing whether he is entitled to in-home care.

The Federal Circuit has previously recognized that mental and physical illness can in some cases justify equitable tolling. *See Arbas v. Nicholson*, 403 F.3d 1379, 1382 (Fed. Cir. 2005); *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004).[9] In the absence

[9] In the criminal context, the mental disability of veterans has been presented by their defense counsel as a valid consideration in judging a defendant's mental state: "I think they should

of equitable tolling, veterans and their dependents will have no recourse when the failure to file was caused by the very disability for which the veteran sought federal assistance. As the dissenting judges from the Federal Circuit noted, the majority's ruling "creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Pet. App. 46a (Mayer, J., dissenting). Upholding the Federal Circuit would run directly afoul of this Nation's "long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines . . . ." *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009) (per curiam).

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always receive some kind of consideration for the fact that their mind has been broken by war." Deborah Sontag & Lizette Alvarez, *In More Cases, Combat Trauma Is Taking the Stand*, N.Y. Times, Jan. 27, 2008, at 1 (quoting Western regional defense counsel for the Marines).

CONCLUSION

The somber and sobering reality is that hundreds of thousands of veterans return from service bearing the emotional and psychological scars of their combat experiences. Unless the Court overturns the Federal Circuit's unbending ruling, those veterans with the most debilitating service-related disabilities will be at greatest risk of losing judicial review of a denial of their federal benefits.

Respectfully submitted,

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32929

TABLE OF CONTENTS

INTERESTS OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. TREATING § 7266(A)'S TIME LIMIT AS JURISDICTIONAL WOULD BE INCONSISTENT WITH CONGRESS'S PRO-VETERAN SCHEME, BOTH ON ITS FACE AND IN PRACTICE. 6

A. Jurisdictional Treatment of § 7266(a) Would Conflict with Congress's Uniquely Benevolent Statutory Scheme for Veterans 6

B. In Practice, Systemic Problems in the VA's Bureaucracy Underscore and Exacerbate this Inconsistency 11

II. IF CONGRESS HAD WANTED TO MAKE SUCH A SHARP DEPARTURE FROM ITS SETTLED PRACTICE OF ACCORDING PREFERENTIAL TREATMENT AND LENIENT PROCEDURES TO VETERANS, IT WOULD HAVE SPOKEN CLEARLY, NOT CRYPTICALLY 17

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Arbaugh v. Y & H Corp,
546 U.S. 500 (2006) 17, 18

Bailey v. West,
160 F.3d 1360 (Fed. Cir. 1998) 7

Boone v. Lightner,
319 U.S. 561 (1943) 18

Borgo v. Shinseki,
No. 06-820, 2009 WL 2873736
(Vet. App. Sept. 4, 2009) 16

Bove v. Shinseki,
No. 08-1468, 2010 WL 318524
(Vet. App. Jan. 28, 2010) 16

Bowen v. City of New York,
476 U.S. 467 (1986) ..... passim

Bowles v. Russell,
551 U.S. 205 (2007) ..... passim

Bronson v. Shinseki,
No. 09-3554, 2010 WL 1507648
(Vet. App. Apr. 16, 2010) 9, 15

Brown v. Gardner,
513 U.S. 115 (1994) 18

Brown v. Shinseki,
No. 10-1490, 2010 WL 2912290
(Vet. App. July 23, 2010) 16

Burnett v. N.Y. Cent. R.R. Co.,
380 U.S. 424 (1965) 9

Coffy v. Republic Steel Corp.,
447 U.S. 191 (1980) 18

FCC v. Pottsville Broad. Co.,
309 U.S. 134 (1940) 24

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 19

Fishgold v. Sullivan Drydock & Repair Corp.,
328 U.S. 275 (1946) 18

Garland v. Shinseki,
No. 09-4311, 2010 WL 1231998
(Vet. App. Mar. 31, 2010) 16

Harris v. Shinseki,
No. 09-567, 2010 WL 668926
(Vet. App. Feb. 26, 2010) 16

Henderson v. Shinseki,
No. 09-4785, 2010 WL 1377354
(Vet. App. Apr. 8, 2010) 16

Horne v. Shinseki,
No. 09-2042, 2009 WL 3446348
(Vet. App. Oct. 28, 2009) 16

Horner v. Andrzjewski,
811 F.2d 571 (Fed. Cir. 1987) 9

Humphreys v. Shinseki,
No. 08-2633, 2009 WL 3353032
(Vet. App. Oct. 20, 2009) 16

Hungerford v. Shinseki,
No. 06-3170, 2010 WL 668909
(Vet. App. Feb. 26, 2010),
vacated as moot due to death of appellant,
2010 WL 1709219 (Vet. App. Apr. 28, 2010) 16

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) 4, 5, 9, 24

Irwin v. Shinseki,
23 Vet. App. 128 (2009) 16

Jaquay v. Principi,
304 F.3d 1276 (Fed. Cir. 2002) (en banc) 9

Johnson v. United States,
130 S. Ct. 1265 (2010) 19, 23

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 18, 19

Ladd v. Shinseki,
No. 09-4787, 2010 WL 2145276
(Vet. App. May 28, 2010) 16

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 18

Mendoza v. Shinseki,
No. 08-3406, 2009 WL 3389907
(Vet. App. Oct. 22, 2009) 16

Murray v. Shinseki,
No. 06-3271, 2009 WL 3157534
(Vet. App. Sept. 29, 2009) 16

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
551 U.S. 644 (2007) 19

NLRB v. Federbush Co.,
121 F.2d 954 (2d Cir. 1941) 19

Norman v. Shinseki,
No. 08-228, 2010 WL 1710732
(Vet. App. Apr. 28, 2010) 16

Palmer v. Shinseki,
No. 06-952, 2009 WL 3720587
(Vet. App. Nov. 9, 2009) 16

Pandoy v. Shinseki,
No. 07-1563, 2009 WL 1631844
(Vet. App. June 11, 2009) 16

Pierre v. Shinseki,
No. 09-3182, 2009 WL 4198412
(Vet. App. Nov. 30, 2009) 16

Pope v. Shinseki,
No. 07-653, 2009 WL 3493049
(Vet. App. Oct. 30, 2009) 16

Posey v. Shinseki,
23 Vet. App. 406 (2010) 2, 15

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BRIEF OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF THE *AMICUS CURIAE* [1]

The Federal Circuit Bar Association ("FCBA") is a national organization for the Bar of the United States Court of Appeals for the Federal Circuit. It unites the different groups across the Nation that practice before that court, seeking to strengthen and serve the court. The FCBA helps facilitate *pro bono* representation for veterans with potential or actual litigation within the Federal Circuit's jurisdiction, with a view to strengthening the litigation process. Association members who are government attorneys played no role in deciding whether to file this brief or in developing the content of this brief.

Holding that the 120-day time limit for veterans to seek judicial review of the Department of Veterans Affairs' ("VA's") denial of disability benefits is jurisdictional would significantly undermine the FCBA's ability to facilitate meaningful *pro bono* representation for disabled veterans. As petitioner emphasizes, most veterans proceed *pro se* in the non-adversarial administrative process. Pet. Br. 8, 26.

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

Moreover, the very service-connected mental illnesses for which veterans seek benefits can impair their ability to comply with the 120-day time limit. *Id.* at 27, 30. Thus, equitable tolling is especially important in this context to permit *pro se* disabled veterans to secure judicial review and potential *pro bono* representation in court.

Jurisdictional treatment of the time limit would also cause many suits to be dismissed even when veterans file notices of appeal before the 120-day window has closed, but misfile them with the VA rather than the Court of Appeals for Veterans Claims ("Veterans Court"). Due to systemic bureaucratic problems at the VA, such misfiling is often fatal: The VA "somewhat routinely" fails to send misfiled appeals to the Veterans Court until after the 120-day window has closed, leading to dismissal when the VA itself bears much of the responsibility for the delay. *Posey v. Shinseki*, 23 Vet. App. 406, 411 (2010) (Hagel, J., concurring); *see also infra* at 16 n.3 (collecting cases). Dismissal under these circumstances is inequitable and hinders the FCBA's ability to help veterans receive a meaningful hearing in an independent court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The time limit for commencing a suit for judicial review of the VA's denial of disability benefits is not jurisdictional, and instead is subject to traditional principles of equitable tolling. As petitioner explains, the statutory text, context, and legislative history all confirm that conclusion. This *amicus* brief focuses primarily on the statutory context. Because Congress did not expressly state that 38 U.S.C. § 7266(a) is jurisdictional, the Government's position that the time limit is nonetheless jurisdictional must stand or fall on the statutory context. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1247–48 (2010). That context makes it extremely unlikely that Congress intended § 7266(a) to be jurisdictional.

Section 7266 is part of a statutory scheme that embodies our Nation's longstanding commitment to care for veterans who have become disabled in connection with their service to our country. Throughout that scheme, Congress repeatedly provided pro-veteran rules and procedures in order to give veterans the benefit of the doubt. Jurisdictional treatment would clash with this scheme by making § 7266(a) unusually rigid and harsh, and denying some veterans their day in court for wholly inequitable reasons — such as when the very disability that gave rise to a suit causes a *pro se* veteran to miss a filing deadline.

Unlike limitations periods that Congress clearly ranked as jurisdictional, § 7266(a) does not provide an express safety valve to allow extensions when

(1) delay is due to good cause or excusable neglect, such as when an illness or disability causes the delay; (2) the claimant never received actual notice of the adverse decision; or (3) the claimant diligently pursued his rights by filing a timely petition, but addressed his claims to the wrong tribunal. Traditional tolling principles provide the needed safety valve so long as § 7266(a) is not jurisdictional. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990). But there would be no safety valve at all if the provision were treated as being jurisdictional. It beggars belief that Congress intended to treat veterans *more* harshly than litigants subject to other time limits that are either expressly jurisdictional with equally express exceptions, or are not jurisdictional and thus subject to equitable tolling. With both of those models to choose from, the notion that Congress would pick and choose the *least* lenient aspects of each model for veterans is implausible.

In this context, moreover, timeliness and finality concerns are at their nadir because multi-year delays by the VA are endemic in this system regardless of whether, for excusable reasons, a veteran misses a filing deadline by a few days or weeks. The VA's high reversal rate on appeal, and its failure to forward *pro se* veterans' notices of appeal to the correct court, also show that the need for judicial review and flexible procedures for seeking that review are both at their zenith in this context. There is no reason Congress would have subjected veterans to unusually unfavorable treatment by making § 7266(a) jurisdictional — and every reason for it to have allowed equitable tolling.

Indeed, the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), resulted from a compromise between competing House and Senate bills, both of which allowed for equitable tolling. There is no indication that, when forging that compromise, Congress chose to depart from its bicameral consensus in favor of equitable tolling.

In light of the overwhelming contextual evidence that Congress did not intend to make § 7266(a) jurisdictional, Congress's use of the bare phrase "notice of appeal" to describe the document that invokes and commences judicial review is hardly clear evidence of a contrary intent. This Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that a notice of appeal that seeks appellate review of a trial court's decision in a civil (though not criminal) action is jurisdictional. *Id.* at 206–07. But this is a different kind of "notice of appeal," because it seeks judicial review of an agency decision. The most likely conclusion is that Congress used the "notice of appeal" label because the Veterans Court's review in some ways resembles an appeal, but did not intend to foreclose the traditional equitable tolling principles that normally apply in the context of judicial review of administrative decisions. *E.g.*, *Irwin*, 498 U.S. at 96; *Bowen v. City of New York*, 476 U.S. 467, 478 (1986).

ARGUMENT

Because Congress did not expressly label the time limit for filing a notice of appeal in the Veterans Court "jurisdictional," the question is whether context clearly indicates that the time limit is nonetheless jurisdictional. *Reed*, 130 S. Ct. at 1247–48. It does not.

I. TREATING § 7266(A)'S TIME LIMIT AS JURISDICTIONAL WOULD BE INCONSISTENT WITH CONGRESS'S PRO-VETERAN SCHEME, BOTH ON ITS FACE AND IN PRACTICE.

A. Jurisdictional Treatment of § 7266(a) Would Conflict with Congress's Uniquely Benevolent Statutory Scheme for Veterans.

Congress has long provided "special solicitude for the veterans' cause," particularly for veterans "who by reason of mental incompetency are unable to protect themselves." *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009); *Spicer v. Smith*, 288 U.S. 430, 435 (1933). As a "means by which the Nation expresses its profound gratitude for the many sacrifices our veterans have made to protect and defend our freedom," Congress has made a profound commitment to provide benefits to veterans who become disabled in connection with their military service. *See* 38 U.S.C. § 1101 *et seq.*; Statement by President Clinton upon Signing H.R. 4864 (Nov. 9, 2000), *reprinted in* 2000 U.S.C.C.A.N. 2017. To honor that commitment, Congress established a "uniquely benevolent statutory framework." *Bailey*

v. West, 160 F.3d 1360, 1369 (Fed. Cir. 1998) (Michel, J., concurring).

Again and again, Congress placed a thumb on the scale in favor of veterans to ensure that they receive all the benefits they have earned through their service to our country. S. Rep. No. 100-418 at 29 (1988). The Secretary of Veterans Affairs must make all "reasonable efforts to assist" a veteran in developing a claim. 38 U.S.C. § 5103A(a). Congress required the Secretary to err on the side of providing too many benefits: whenever "there is an approximate balance of positive and negative evidence," the Secretary "shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b). And Congress established a lopsided scheme for obtaining court review: A veteran can challenge an adverse decision by the VA's Board of Veterans' Appeals ("Board") in the Veterans Court, but the Secretary cannot. 38 U.S.C. § 7252(a).

Treating § 7266(a)'s time limit as jurisdictional would, in jarring contrast, single out veterans for unusually *unfavorable* treatment on that issue. Other time limits that are jurisdictional, including the one at issue in *Bowles*, contain express tolling provisions for good cause, excusable neglect, or lack of notice. *E.g.*, 28 U.S.C. §§ 2107(c), 2101(c). Section 7266(a), however, consists of only a single sentence stating that a veteran seeking to obtain Veterans Court review of an adverse Board decision "shall file" within 120 days. Thus, if § 7266(a) were jurisdictional, it would be an outlier both within the context of veterans' benefits, where Congress has consistently bent over backwards to favor veterans, and within the context of jurisdictional statutes,

which generally confirm their jurisdictional character by including express exceptions to mitigate their harsh effects — even when special solicitude for a group like veterans is *not* at issue. The absence of any written exceptions in § 7266(a) is thus a tipoff that Congress did not intend to make Section 7266(a) jurisdictional.

For example, the statute at issue in *Bowles* generally requires a notice of appeal in a civil case to be filed within 30 days. 28 U.S.C. § 2107(a). But Congress did not leave it at that. Instead, Congress provided two exceptions to the general rule: (1) a district court may extend the time for "excusable neglect or good cause"; and (2) a district court may "reopen" the time for up to 14 days if the party did not receive notice of the judgment. § 2107(c).

Similarly, when Congress imposed a jurisdictional time limit on the filing of a petition for a writ of certiorari in a civil case, Congress made sure to allow a 60-day extension "for good cause shown." 28 U.S.C. § 2101(c). *Bowles* confirms that §§ 2107(c) and 2101(c) are jurisdictional, and thus are not subject to additional, non-statutory exceptions. *Bowles*, 551 U.S. at 212 & n.4. But if § 7266(a) were jurisdictional, it would be much harsher than either §§ 2107(c) or 2101(c) — which govern the vast majority of civil appeals — because its time limit could not be extended or reopened for any reason at all.[2]

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[2] In refusing to craft an exception to the statute's enumerated exceptions, *Bowles* comported with the rule that "the expression of one exception indicates that no other exceptions

Nor does § 7266(a) make any allowance for veterans who misfile notices of appeal in the wrong forum. In contrast, a "notice of appeal" from a district court judgment in a civil case is deemed to have been timely filed in the district court even if it was "mistakenly filed in the court of appeals." Fed. R. App. P. 4(d). A similar rule applies to a complaint that was timely filed in the wrong district court. 28 U.S.C. § 1406(a), *see also* 28 U.S.C. § 1631 (allowing transfer to cure want of jurisdiction). But neither of those provisions applies here, in part because the Veterans Court is an Article I court. *See* 38 U.S.C. § 7251, Fed. R. App. P. 1(a)(1).

If equitable tolling applies to § 7266(a), the absence of any provision for misfilings makes perfect sense, because equitable tolling protects a litigant who timely files in the wrong court. *Irwin*, 498 U.S. at 96 & n.3, *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434–35 (1965); *Jaquay v. Principi*, 304 F.3d 1276, 1288–89 (Fed. Cir. 2002) (en banc). But if § 7266(a) were jurisdictional, equitable tolling would not provide that needed safety valve, and veterans would be singled out for unusually unfavorable treatment. *E.g.*, *Bronson v. Shinseki*, No. 09-3554, 2010 WL 1507648 (Vet. App. Apr. 16, 2010) (dismissing misfiled appeal under jurisdictional reading of § 7266(a)); *see also infra* at 16 n.3 (collecting cases).

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apply." *Horner v. Andrzejewski*, 811 F.2d 571, 575 (Fed. Cir. 1987), *accord* 2A Norman J. Singer & J.D. Shambie Singer, Sutherland on Statutes and Statutory Construction § 47.11 (7th ed. 2007). But this principle does not apply here, because, unlike §§ 2107(c) and 2101(c), § 7266(a) contains no express exceptions at all.

Such a harsh interpretation of § 7266(a) would produce no end of bizarre results. The time limit for challenging the denial of disability benefits would be stricter for veterans than for non-veterans, whose claims under the Social Security Act are eligible for tolling. *Bowen*, 476 U.S. at 478. And the time limit for veterans to seek their *first* day in court would be stricter than the jurisdictional time limit for a civil litigant to appeal to a *second* (appellate) court after a loss at trial because, as discussed above, § 2107(c), but not § 7266(a), contains exceptions for "good cause" and lack of notice. Indeed, a veteran would face stricter limits commencing suit than a criminal seeking to appeal one court's judgment to another court, as the time limit for appeals in criminal cases is not jurisdictional. *Bowles*, 551 U.S. at 212; *Schacht v. United States*, 398 U.S. 58, 64 (1970) (same for certiorari deadline in criminal cases).

Further, a *pro se* veteran who sought his first hearing in court would receive no hearing at all if he filed in the wrong forum, while a counseled party in a civil or criminal case could misfile in the wrong forum without consequence either when initiating suit in the district court or when seeking a second bite at the apple in the Court of Appeals. § 1406(a); Fed. R. App. P. 4(d). And a veteran who misfiled his notice of appeal to the Veterans Court would have his lawsuit dismissed, but a veteran could misfile a subsequent appeal to the Federal Circuit without facing this penalty. Fed. R. App. P. 4(d).

It would be more than passing strange for Congress to single out veterans for such unusually harsh treatment.

B. In Practice, Systemic Problems in the VA's Bureaucracy Underscore and Exacerbate this Inconsistency.

Systemic problems with the VA's bureaucracy, of which Congress was surely aware, make it especially unlikely that Congress would have chosen to erect unusually strict requirements for veterans seeking judicial review of the VA's decisions.

1. The VA's bureaucracy is infamously slow, opaque, and nonresponsive. The VA acknowledges that it has faced a "historical struggle to process claims promptly." VA Office of Inspector General, Audit of VA Regional Office Rating Claims Processing Exceeding 365 Days, at 1 (Sept. 23, 2009) ("OIG Report"), http://www4.va.gov/oig/52/reports/2009/VAOIG-08-03156-227.pdf. News reports have more colorfully described the process as "bureaucratic hell" and "worthy of an infernal ring from Dante." Lawrence Downes, *For Wounded Veterans and Their Families, a Journey Without Maps*, N.Y. Times, Mar. 24, 2008; *Slogging on the Home Front*, Editorial, N.Y. Times, Oct. 6, 2007.

As early as 1978, the General Accounting Office ("GAO") reported to Congress that veterans "generally wait months while VA processes their claims." GAO Report, Veterans Administration Can Reduce the Time Required to Process Veterans' and Survivors' Initial Claims for Benefits at i (Dec. 27, 1978), http://archive.gao.gov/f0302/108464.pdf. In 1987, the year before Congress enacted § 7266(a), Congress held hearings on "widespread problems in VA's claims-processing procedures." GAO Report, Veterans' Benefits: Improvements Needed in

Processing Disability Claims at 2 (June 22, 1989), http://archive.gao.gov/ t2pbat14/139141.pdf.

The VA has made laudable efforts to ameliorate these problems, but they persist. In 2008, the VA had a backlog of 78,000 claims that had been pending for more than 6 months. GAO Report, Veterans Disability Benefits: Preliminary Findings on Claims Processing Trends and Improvement Efforts 6 (July 29, 2009) ("Backlog Report"), http://www.gao.gov/new.items/d09910t.pdf. That does not count the additional 88,000 claims that were pending on appeal to the Board, *id.* at 2, a process that is staggeringly slow. The average appeal takes 1,082 days — nearly three years — 96% of which time is taken up by the VA. Board of Veterans' Appeals, Annual Report of the Chairman at 16 (2009) ("Board Report"), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf. And when the Board remands, which it does in 37% of its cases, the remand adds on average another 535 additional days — nearly a year and a half. *Id.* at 16, 21.

As former Secretary Anthony Principi put it, "[s]tuff just goes into a big black hole sometimes." Robert Tomsho & Rachel Zimmerman, *Coming Home: Seeking Benefits, Disabled Soldier Faced New Battle*, Wall St. J., Aug. 12, 2003, at A1. For example, one veteran who sought benefits for post-traumatic stress disorder and an ulcer did not hear back from the VA for 671 days — nearly two years — during the vast majority of which time the VA was doing nothing. OIG Report 8. When the VA finally processed the claim, it retroactively awarded the veteran $19,437 in benefits. *Id.* In another case, a veteran filed a claim for a service-connected back

injury, but the VA lost his file, resulting in 22 months of delay. *Id.* at 14–15; *see also id.* (misplaced files on average caused 224 days of delay).

In this system, where extensive delays by the VA are routine, it is not plausible to assert that an unforgiving and inflexible cutoff for veterans' filings is needed to promote any interest in timeliness or finality. A few days or weeks of excusable delay by a veteran is immaterial in the context of the VA's administrative system.

2. Moreover, systemic failures at the VA contribute not only to delays in processing claims, but also to a high error rate. As petitioner explains, the Veterans Court reverses the VA approximately 80% of the time, and awards attorney's fees because the VA's position was not even substantially justified about half of the time. Pet. Br. 8, 27. That makes it all the more imperative that veterans have effective recourse to judicial review.

The need for flexibility is accentuated by the fact that, consistent with the tradition that the VA's process is "ex parte in nature and non-adversarial," 68% of veterans initiate Veterans Court review without the assistance of counsel. 38 C.F.R. § 20.700(c); U.S. Court of Appeals for Veterans Claims, Annual Report at 1 (2009), http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf. As Judge Dyk emphasized, it is "extremely difficult" for *pro se* veterans with mental disabilities "to navigate the system and meet the statutory deadline" — a concern that is "not merely hypothetical, as [the Federal Circuit's] decisions demonstrate." Pet. App.

44a (Dyk, J., concurring) (citing cases). "Because so many veterans must file their petitions without the assistance of counsel, it is highly unlikely that Congress intended for section 7266(a) to serve as a harsh and inflexible jurisdictional bar." *Id.* at 69a (Mayer, J., dissenting) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982)).

Especially in light of the VA's soaring reversal rate, an inflexible impediment to *pro se* veterans' efforts to secure judicial review would not only deprive many veterans of the procedural right to a day in court. It would also produce substantively unjust outcomes in many cases by depriving veterans of wrongfully denied, and much needed, benefits.

3. Notwithstanding the importance of judicial review, and the VA's statutory obligation to assist veterans, the VA routinely bears a significant amount of the responsibility for a *pro se* veteran's delay in filing a notice of appeal in the correct forum. A number of *pro se* veterans mistakenly file a notice of appeal with the VA or the VA's Board of Veterans' Appeals — which rendered the adverse decision and thus is the ordinary recipient of a notice of appeal — rather than the Veterans Court, as § 7266(a) requires. The 120-day time limit is sufficiently long that, if the VA returned misfiled notices within a reasonable time, or forwarded them to the right place (the Veterans Court), misfiling would rarely result in dismissal under any rule. But the VA "somewhat routinely holds" misfiled notices of appeal until after the 120-day limit has expired, forwards them to the wrong place, or both. *Posey v.*

Shinseki, 23 Vet. App. 406, 411 (2010) (Hagel, J., concurring).

For example, in *Bronson v. Shinseki*, No. 09-3554, 2010 WL 1507648 (Vet. App. Apr. 16, 2010), the veteran diligently submitted a notice of appeal a month after an adverse Board decision, but sent it to the Board rather than the Veterans Court. Two months later, the Board forwarded the notice to the VA Regional Office, which waited 75 days before sending the notice to the Veterans Court after the 120-day period had expired. *Id.* at *1. In *Williams v. Shinseki*, No. 07-2548, 2009 WL 4979749 (Vet. App. 2009), various VA offices and the Board sent a diligently submitted but misdirected notice of appeal back and forth for 14 months — far longer than the entire limitations period. *Id.* at *1. In *Rickett v. Shinseki*, 23 Vet. App. 366 (2010), the veteran diligently submitted a notice of appeal to the one person who should certainly know what to do with it: the VA's General Counsel. *Id.* at 367. The General Counsel's Office waited 24 days before forwarding the letter to the wrong place (the Regional Office), which in turn did nothing until the 120-day period had elapsed. *Id.* at 367–68. In all of these cases, the veteran's claim was dismissed for lack of jurisdiction.

The VA's failure to inform veterans that they have misfiled appeals or to forward those appeals to the Veterans Court is hard to square with its statutory obligation to make "reasonable efforts to assist" veterans and give them the "benefit of the doubt." 38 U.S.C. §§ 5103A(a), 5107(b). Yet these

examples are far from isolated; this fact pattern occurs with stunning frequency.[3]

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[3] *E.g.*, *Horne v. Shinseki*, No. 09-2042, 2009 WL 3446348 (Vet. App. Oct. 28, 2009) (Regional Office sat on filing for 217 days); *Pierre v. Shinseki*, No. 09-3182, 2009 WL 4198412 (Vet. App. Nov. 30, 2009) (otherwise timely appeal shuffled between VA offices for 158 days); *Murray v. Shinseki*, No. 06-3271, 2009 WL 3157534 (Vet. App. Sept. 29, 2009) (same for 139 days); *Pandoy v. Shinseki*, No. 07-1563, 2009 WL 1631844 (Vet. App. June 11, 2009) (VA inaction for 125 days); *Bove v. Shinseki*, No. 08-1468, 2010 WL 318524 (Vet. App. Jan. 28, 2010) (same for 116 days, at which point time had expired); *Irwin v. Shinseki*, 23 Vet. App. 128, 128–29 (2009) (same); *Palmer v. Shinseki*, No. 06-952, 2009 WL 3720587 (Vet. App. Nov. 9, 2009) (same for 106 days); *Borgo v. Shinseki*, No. 06-820, 2009 WL 2873736 (Vet. App. Sept. 4, 2009) (same for 66 days); *Garland v. Shinseki*, No. 09-4311, 2010 WL 1231998 (Vet. App. Mar. 31, 2010) (41 days); *Pope v. Shinseki*, No. 07-653, 2009 WL 3493049 (Vet. App. Oct. 30, 2009) (36 days); *Norman v. Shinseki*, No. 08-228, 2010 WL 1710732 (Vet. App. Apr. 28, 2010) (35 days); *Harris v. Shinseki*, No. 09-567, 2010 WL 668926 (Vet. App. Feb. 26, 2010) (VA informed veteran of misfiling four months after 120-day period had expired); *Humphreys v. Shinseki*, No. 08-2633, 2009 WL 3353032 (Vet. App. Oct. 20, 2009) (VA sat on filing for seven months); *Stambush v. Shinseki*, No. 08-2984, 2010 WL 318493 (Vet. App. Jan. 28, 2010) (same for 44 days); *Brown v. Shinseki*, No. 10-1490, 2010 WL 2912290 (Vet. App. July 23, 2010) (otherwise timely appeal dismissed for misfiling); *Ladd v. Shinseki*, No. 09-4787, 2010 WL 2145276 (Vet. App. May 28, 2010) (same); *Henderson v. Shinseki*, No. 09-4785, 2010 WL 1377354 (Vet. App. Apr. 8, 2010); *Mendoza v. Shinseki*, No. 08-3406, 2009 WL 3389907 (Vet. App. Oct. 22, 2009) (same); *Westmoreland v. Shinseki*, No. 09-2298, 2009 WL 3780674 (Vet. App. Nov. 12, 2009) (same); *Hungerford v. Shinseki*, No. 06-3170, 2010 WL 668909 (Vet. App. Feb. 26, 2010) (same), *vacated as moot due to death of appellant*, 2010 WL 1709219 (Vet. App. Apr. 28, 2010).

The Government has no legitimate interest in using the 120-day deadline to require prompt action by a veteran in the many cases where the veteran *does* act promptly but the VA sits on the filing until after the time limit has expired. It is the epitome of unfairness for the Government to play a significant role in causing a filing to be late and then gain dismissal for that reason. If equity did not already have a doctrine for this situation — equitable tolling — it would surely adopt one.

Indeed, the Government's Brief in Opposition failed to identify *any* viable reason why Congress would treat disabled veterans so harshly. Instead, the Government all but admitted there is no such reason by arguing that, if this Court did not reverse the judgment of the Federal Circuit, Congress would likely abrogate it. Br. in Opp. 13–15.

II. IF CONGRESS HAD WANTED TO MAKE SUCH A SHARP DEPARTURE FROM ITS SETTLED PRACTICE OF ACCORDING PREFERENTIAL TREATMENT AND LENIENT PROCEDURES TO VETERANS, IT WOULD HAVE SPOKEN CLEARLY, NOT CRYPTICALLY.

Together with the statutory text and legislative history, the context discussed above confirms that Congress did not express a clear intent to make the time limit jurisdictional. This Court requires a clear statement from Congress to overcome the presumption that statutory requirements are "nonjurisdictional in character." *Reed*, 130 S. Ct. at 1244 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16 (2006)). Congress must be even clearer

in this context, as any interpretive doubt in a statute governing veterans benefits "is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994); *see also, e.g., King v. St. Vincent's Hospital*, 502 U.S. 215, 220–21 n.9 (1991); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

1. When Congress intends to make a requirement jurisdictional, it typically says so expressly or places the requirement in a statute that grants subject-matter jurisdiction. *Arbaugh*, 546 U.S. at 515 & n.11 (collecting citations); *see, e.g.*, 28 U.S.C. § 1331 (presence of a question "arising under" federal law is jurisdictional); § 1332 (diversity of citizenship and the presence of an amount in controversy greater than $75,000 are jurisdictional). Here, Congress did no such thing. Section 7266 does not use the word "jurisdiction" or otherwise confer subject matter jurisdiction. To the contrary, the statute elsewhere addresses the court's jurisdiction, and Congress pointedly left § 7266 out of the Act's "Jurisdiction" subchapter, placing it instead in the "Procedure" subchapter. *See* 38 U.S.C. Part V, Chp. 72, Subchps. I, II.

Moreover, rather than "'speak[ing] to the power of the court'" (*i.e.*, jurisdiction), Section 7266 speaks "'to the rights or obligations of the parties'" (*i.e.*, non-jurisdictional claims-processing requirements). *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). Section 7266(a) dictates what "a

person adversely affected by [an adverse Board] decision" must file, not what a court is empowered to hear. § 7266(a).

Of course, Congress need not use magic words to speak clearly. "*Bowles* stands for the proposition that context . . . is relevant to whether a statute ranks a requirement as jurisdictional." *Reed*, 130 S. Ct. at 1247–48. That follows from the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000)). "Ultimately, context determines meaning." *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010). *See also King*, 502 U.S. at 221 ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ." (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.))).

As set forth above, the broader context overwhelmingly supports the view that Congress did *not* intend the 120-day limit to be jurisdictional. Contrary to Congress's *uniquely benevolent* statutory scheme for veterans, a jurisdictional interpretation of § 7266(a) would be *unusually harsh* both on its face and in practice, causing manifest injustice with stunning frequency and without serving any larger purpose.

2. The drafting and legislative history provide further evidence that Congress did not intend to make § 7266(a) jurisdictional and thereby preclude equitable tolling. The Veterans' Judicial Review Act was enacted after the House and Senate passed competing bills — both of which allowed for equitable tolling — and the Senate and House Committees on Veterans Affairs brokered a compromise between the two. *See* Senate and House Committees on Veterans' Affairs, Explanatory Statement on Compromise Agreement on Division A, 134 Cong. Rec. S 16650 (Oct. 18, 1988) ("Explanatory Statement"), *reprinted in* 1988 U.S.C.C.A.N. 5834. The bill that passed the Senate provided that a veteran could obtain review of an adverse Board decision "in a civil action commenced within 180 days" by filing a "complaint" in the local United States Court of Appeals. S. 11, 100th Cong. § 4025(b)(2), (c), (d). This language is materially identical to language that *Bowen* held to allow tolling and that the Government acknowledges would have allowed tolling here. *Bowen*, 476 U.S. at 478; Br. in Opp. 7–8.

The House took a more aggressive approach to ensuring that veterans would receive a hearing before an independent court, in part by voting to replace the Board with a specialized Article I court named the "Court of Veterans Appeals." H.R. 5288, 100th Cong. §§ 4001, 4002; *see* Explanatory Statement at 5844. This new court's review would be commenced in the same way as the Board review it was supplanting: The veteran would file a "notice of disagreement" with the VA, which would resolve the dispute or mail a "statement of the case" to the veteran, who then had 90 days to "file a formal

appeal." H.R. 5288 § 4015(c), (d)(1); *see also* Explanatory Statement at 5849. The House expressly provided for tolling: The 90-day window could be extended "for good cause shown." H.R. 5288 § 4015(d)(1).

Under a compromise brokered between the Senate and House Committees on Veterans Affairs, Congress charted a middle course on the disputed issues without expressing any intent to depart from *both* Chambers' bills by precluding equitable tolling. As relevant here, Congress established a specialized Article I court (as per the House), but did not eliminate the Board (as per the Senate). 38 U.S.C. §§ 7251, 7252; *see* Explanatory Statement at 5844, 5849. Because Congress agreed to have the new court review the Board's decisions, rather than supplant the Board entirely, Congress did not keep the Board's convoluted "notice of disagreement"/"statement of the case"/"formal appeal" procedure. Instead, Congress simply provided that a veteran should file a "notice of appeal," and did not expressly address equitable tolling. § 7266; *see* Explanatory Statement at 5849.

By far the most logical inference is that, like the Senate bill, the final bill does not include an express "good cause" exception because its time limit is not jurisdictional and thus does not need such an express exception. It would be most odd for a compromise bill to alter a provision upon which there had been no disagreement — that equitable tolling should apply. Moreover, the unusually detailed legislative history makes no reference to such a shift. The 30-page Explanatory Statement marches section by section, explaining "[t]he

difference[s] between [the House and Senate bills] and the provisions of the compromise agreement," excluding only "clerical corrections, conforming changes made necessary by the compromise agreement, and minor drafting, technical, and clarifying changes." *Id.* at 5834. If the Committee had opted to replace mutually agreeable equitable tolling provisions with an unprecedentedly harsh rule of jurisdiction, it is hard to imagine that it would not have prompted a comment in the Explanatory Statement.

On the other hand, the Conference Committee's decisions not to include the House's express "good cause" exception and not to discuss that decision in the detailed explanatory statement are perfectly logical if § 7266(a) is not jurisdictional. Under that interpretation, the final bill, House bill, and Senate bill all allow equitable tolling, and thus there is no "difference" to explain. *Id.* The choice of the label "appeal" follows from the House bill, which used the same label for the filing that ultimately triggered court review. H.R. 5288 § 4015(c). And the absence of an express "good cause" provision follows from the Senate bill, which included no such provision because it would be superfluous. *See Bowen*, 476 U.S. at 478.

3. Against all of the statutory text, context, and legislative history discussed above, the Government relies on Congress's choice of the label "notice of appeal." Br. in Opp. 5. That label cannot bear the weight the Government places upon it. At the outset, "notice of appeal" is not a term of art with an unambiguous meaning as to jurisdictional status:

time limits upon a "notice of appeal" in a criminal case are *not* jurisdictional. *Bowles*, 551 U.S. at 212.

And even though *Bowles* held that notices of appeal seeking appellate review of judicial decisions are generally jurisdictional in civil cases governed by other statutory time periods, this Court does "not assume that a statutory word is used as a term of art where that meaning does not fit." *Johnson*, 130 S. Ct. at 1270. No matter how you slice it, Congress used the "notice of appeal" label in a novel way. A "notice of appeal" is ordinarily a document used to obtain a higher court's review of an earlier court's decision. *E.g.*, 28 U.S.C. § 2107; Fed. R. App. P. 4(b)(1); Black's Law Dictionary 1092 (8th ed. 2004) (a "notice of appeal" is "[a] document filed with a court * * * stating an intention to appeal a trial court's judgment or order"). But here, Congress affixed that label to a document used to commence a lawsuit in the first place, in order to give a veteran his first day in court to review the ruling of an administrative agency. Pet. App. 26a (Henderson's appeal "represented the first time he could appear before a court.").

This Court has never addressed the characterization of a "notice of appeal" in this context. Thus, unlike in *Bowles*, there is no longstanding court precedent establishing that § 7266(a) imposes a "type of limitation" that is "properly ranked as jurisdictional [even] absent an express designation." *Reed*, 130 S. Ct. at 1248.

To the contrary, this Court has long cautioned that appellate review of trial court decisions and judicial review of agency decisions are birds of a very

different feather. *E.g.*, *Sims v. Apfel*, 530 U.S. 103, 110 (2000); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940). In the latter, more apposite context — statutory time limitations on commencing judicial review of administrative decisions — this Court has generally allowed equitable tolling. *Bowen*, 476 U.S. at 478; *Irwin*, 498 U.S. at 96; *Zipes*, 455 U.S. at 394; *but cf. Stone v. INS*, 514 U.S. 386, 400 (1995). Unlike in *Bowles*, therefore, there is no longstanding pattern of judicial decisions relating to this "type of limitation" that could provide a sufficiently clear statement of Congress's intent "even absent the jurisdictional label." *Reed*, 130 S. Ct. at 1248. Instead, the context and legislative history discussed above confirm that Congress did not intend to make the time limit jurisdictional without saying so.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Federal Circuit.

RESPECTFULLY SUBMITTED

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AMICUS CURIAE BRIEF

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IN THE

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ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF ALLAN G. HALSETH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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32931

TABLE OF CONTENTS

	Page
Question Presented	i
Interest Of *Amicus Curiae*	1
Summary Of Argument	4
Argument	6
A. Section 7266(a)'s Text Demonstrates That Its Timing Requirement Is Not Jurisdictional	9
B. The Decision Below Cannot Be Reconciled With Either The Canon Requiring Ambiguity To Be Resolved In The Veteran's Favor Or The Humane Principles The Canon Reflects	16
C. *Amicus*'s Circumstance Demonstrates Precisely Why Congress Could Not Have Intended The Government's Construction	24
D. *Bowles* Does Not Compel A Contrary Result	26
Conclusion	31

TABLE OF AUTHORITIES

Page

CASES

Ala. Power Co. v. *Davis*, 431 U.S. 581 (1977) 20

Arbaugh v. *Y & H Corp.*, 546 U.S. 500 (2006) ..... *passim*

Baltimore & Ohio R.R. Co. v. *Pitcairn Coal Co.*, 215 U.S. 481 (1910) 23

Boone v. *Lightner*, 319 U.S. 561 (1943) 22

Bowen v. *City of New York*, 476 U.S. 467 (1986) ..... *passim*

Bowles v. *Russell*, 551 U.S. 205 (2007) ..... *passim*

Browder v. *Dir., Dep't of Corrections of Ill.*, 434 U.S. 257 (1978) 14, 31

Brown v. *Gardner*, 513 U.S. 115 (1994) ..... *passim*

Carlisle v. *United States*, 517 U.S. 416 (1996) 13

Carlsbad Tech., Inc. v. *HIF Bio, Inc.*, 129 S. Ct. 1862 (2009) 11

Coffy v. *Republic Steel Corp.*, 447 U.S. 191 (1980) 22

Eberhart v. *United States*, 546 U.S. 12 (2005) 9

Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946) 7, 20, 22

Gambill v. *Shinseki*, 576 F.3d 1307 (Fed. Cir. 2009) 31

Halseth v. *Nicholson*, No. 05-3646, 2006 WL 1523106 (Vet. App. June 1, 2006) 3, 24, 25

TABLE OF AUTHORITIES—Continued

Page

Halseth v. *Peake*, No. 05-3646, 2008 WL 3978971 (Vet. App. Aug. 21, 2008) 3, 25

Henderson v. *Peake*, 22 Vet. App. 217 (2008)..... 3, 25

Irwin v. *Dep't of Veterans Affairs*, 498 U.S. 89 (1990)..... 5, 12, 14

King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991)..... 22, 23

Kontrick v. *Ryan*, 540 U.S. 443 (2004)..... 10

Landsman v. *United States*, 205 F.2d 18 (D.C. Cir. 1953)..... 22

Missouri v. *Jenkins*, 495 U.S. 33 (1990)..... 15

Reed Elsevier, Inc. v. *Muchnick*, 130 S. Ct. 1237 (2010)..... *passim*

Rockwell Int'l Corp. v. *United States*, 549 U.S. 457 (2007)..... 10

Shinseki v. *Sanders*, 129 S. Ct. 1696 (2009)..... *passim*

Steel Co. v. *Citizens for Better Env't*, 523 U.S. 83 (1998)..... 9

Stone v. *INS*, 514 U.S. 386 (1995)..... 16

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta*, 552 U.S. 148 (2008)..... 29

United States v. *Denedo*, 129 S. Ct. 2213 (2009)..... 29, 30

Walters v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 31

Walton v. *Cotton*, 60 U.S. (19 How.) 355 (1856)..... 4, 21, 23

Young v. *United States*, 535 U.S. 43 (2002)..... 8, 9

TABLE OF AUTHORITIES—Continued

Page

Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982) 11, 14, 24

STATUTES, REGULATIONS, AND RULES

28 U.S.C. §1331 10
28 U.S.C. §1332(a) 10
28 U.S.C. §2101(c) 15, 16
28 U.S.C. §2107 14
28 U.S.C. §2107(a) 13, 15
28 U.S.C. §2107(c) 13, 15, 16, 29
38 U.S.C. §5103A(a)(1) 7
38 U.S.C. §5103A(b)(1) 7
38 U.S.C. §5103A(d) 7
38 U.S.C. §5107(b) 7
38 U.S.C. §7104 7
38 U.S.C. §7105 7
38 U.S.C. §7106 7
38 U.S.C. §7107 7
38 U.S.C. §7252(a) 7
38 U.S.C. §7261(b)(1) 7
38 U.S.C. §7263(b) 7
38 U.S.C. §7263(c) 7
38 U.S.C. §7263(d) 7
38 U.S.C. §7266(a) ..... *passim*
Pub. L. No. 100-687, 102 Stat. 4105 (1988) ..... *passim*
38 C.F.R. §20.700(c) 7
38 C.F.R. §20.1000 31

TABLE OF AUTHORITIES—Continued

Page

38 C.F.R. §20.1001 31

Fed. R. App. P. 4(a)(6) 13

MISCELLANEOUS

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H.R. Rep. No. 100-963 (1988) 18, 19, 20

Library of Congress Federal Research Division, *The Veterans Benefits Administration* (1995) 19

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Journals of the Continental Congress 1774-1789 (1906) 18

S. Rep. No. 100-418 (1988) 20

U.S. Br. in No. 08-103 (June 2009) 11, 14, 27

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IN THE

Supreme Court of the United States

No. 09-1036

DAVID L. HENDERSON,
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v.
ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF ALLAN G. HALSETH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

This Nation has long provided disability benefits to veterans for service-connected illnesses, both as an inducement to serve and as compensation for veterans' loyal service to their country.[1] This case concerns whether 38 U.S.C. § 7266(a)'s 120-day time limit for a veteran to

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk in accordance with this Court's Rule 37.3(a). Pursuant to this Court's Rule 37.6, *amicus* certifies that no counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus* and its counsel made such a contribution.

seek review of a decision denying him disability benefits in the Court of Appeals for Veterans Claims ("Veterans Court") may be equitably tolled because, for example, the very disability for which he seeks compensation prevented him from meeting that deadline.

That issue is of grave concern to *amicus* Allan Halseth. *Amicus* served in the U.S. Marine Corps from 1968 to 1972. *Halseth* v. *Shinseki*, No. 05-3646, Rec. on Appeal at 2, 58-76 (C.A.V.C.) ("*Halseth* ROA"). He fought in Vietnam, *id.* at 76, received several medals for combat service, *ibid.*, and was honorably discharged, *ibid.* Due to a head injury suffered while in the Marines, *amicus* suffers from "recurrent temporal disorientation," a "neurocognitive deficit[ ]" that not only "interfer[es] with his capacity to carry out routine daily activities of daily living in a consistent manner," but also causes him "to 'lose track' of significant passages of time (days, perhaps weeks) and thus miss critical deadlines or appointments." Vet. Ct. Case No. 05-3646, Apr. 10, 2006 Dkt. Entry, at 2-3; Apr. 20, 2006 Dkt. Entry, at 1. After initially being denied benefits for that injury,[2] *amicus* then filed an untimely notice of appeal as a result of his temporal disorientation.

The Veterans Court instructed *amicus* to present evidence that his failure to file a timely notice of appeal resulted from his diagnosed illness. Feb. 17, 2006 Dkt. En-

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[2] *Amicus* sought compensation for (among other things) a left shoulder injury and a head injury suffered during his time in uniform. *Halseth* ROA 380-381. Consistent with his doctor's diagnosis, *amicus* presented evidence that his head injury caused memory loss. *Id.* at 940-942, 948. On July 29, 2005, the Board of Veterans' Appeals denied service connection for his claim. *Id.* at 1-20. *Amicus* filed his notice of appeal from that decision on December 21, 2005. See Vet. Ct. Case No. 05-3646, Dec. 21, 2005 Dkt. Entry, at 1.

try, at 2. Based on testimony from *amicus*'s physician, the Veterans Court eventually determined that the standard had been met. The "evidence presented in this case," the Court found, "is sufficient to warrant equitable tolling." *Halseth* v. *Nicholson*, No. 05-3646, 2006 WL 1523106, at *2 (Vet. App. June 1, 2006). Accordingly, on June 1, 2006, the Veterans Court ordered that *amicus*'s notice of appeal be considered timely. *Ibid.*

Two years later, however, the Veterans Court dismissed petitioner's case, holding that this Court's decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007), precluded equitable tolling. *Henderson* v. *Peake*, 22 Vet. App. 217 (2008). Relying on the decision in petitioner's case, the Veterans Court dismissed *amicus*'s appeal. *Halseth* v. *Peake*, No. 05-3646, 2008 WL 3978971, at *1 (Vet. App. Aug. 21, 2008). Petitioner and *amicus* separately appealed to the Federal Circuit. *Amicus*'s case was stayed pending the outcome in petitioner's.

Because of *amicus*'s interest in this matter, the Federal Circuit granted him leave to present oral argument before the panel below, and he submitted an *amicus* brief. *Amicus* retains the same strong interest before this Court.[3] *Amicus*, moreover, has a unique perspective and experience regarding the practical impact of the decision below on the operation of the veterans benefits

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[3] Indeed, following the decision below, *amicus* and the United States agreed that the Federal Circuit should summarily affirm the Veterans Court's judgment dismissing *amicus*'s appeal as untimely. See *Halseth* v. *Shinseki*, No. 2009-7048, Dkt. Entry Nos. 14, 15 (Fed. Cir.). Doing so would have allowed *amicus* to seek further review before this Court. The Federal Circuit refused (and again refused after a request for reconsideration), instead staying the case pending the Court's decision in this case. See *id.*, Dkt. Entry Nos. 16-18. The absence of a final judgment from the Federal Circuit precluded *amicus* from filing his own petition for a writ of certiorari.

system: The Veterans Court has *already* determined that the very injury for which *amicus* seeks benefits prevented him from filing a timely notice of appeal and that equitable tolling therefore *would apply* if §7266(a) permits it. That gives *amicus* both a substantial interest in this case and a unique perspective on the decision's likely impact.

SUMMARY OF ARGUMENT

The Nation's system of veterans benefits must be interpreted, where possible, liberally in favor of the veteran in "special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1707 (2009). That principle reflects the historical understanding that, because those who have served and sacrificed for their country are owed a debt of gratitude, the system established for their benefit is presumed to embody "benign polic[ies]," borne of "humane motive," and to exclude constructions that do not represent "a fit discrimination of national gratitude." *Walton* v. *Cotton*, 60 U.S. (19 How.) 355, 358 (1856). The construction of 38 U.S.C. §7266(a) adopted by the court below—which renders §7266(a)'s 120-day deadline a harsh and exceptionless trap—cannot be reconciled with that principle. Indeed, under that construction, the court would strip a veteran of his right to judicial review based on an untimely filing even when that default resulted from the very disability for which the veteran seeks compensation.

A. This Court's cases demonstrate that a statute is presumptively jurisdictional if and only if its text places a limit on the power of a court to hear a case. By contrast, where the statute does not address itself to the authority of the court, but rather instructs a *litigant* on how to proceed, it is likely non-jurisdictional.

Section 7266(a) by its terms falls squarely in the latter category. It provides that "a *person adversely affected* by" a final decision of the Board of Veterans' Appeals "*shall file* a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed." 38 U.S.C. §7266(a) (emphasis added). It thus clearly directs itself to the steps the veteran must take. As this Court has held in cases like *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010), *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Bowen* v. *City of New York*, 476 U.S. 467 (1986), statutes phrased in such terms—as opposed to focusing on the power of the court—are non jurisdictional.

B. While the text of §7266(a) alone demonstrates that it is non-jurisdictional, any ambiguity must be resolved based on this Court's longstanding canon that veterans benefits statutes should be interpreted liberally in the veteran's favor. The canon derives from a millennia-old understanding that governments have a duty to provide for those who have served them so loyally. That canon requires Article III courts to give the veteran the benefit of any "interpretive doubt."

C. *Amicus*'s own experience demonstrates precisely why the government's attempt to convert §7266(a) into a categorical bar on relief for untimely filings is untenable. The Veterans Court has *already* determined that *amicus* missed his deadline because of one of the very illnesses for which he seeks compensation. That illness has already cost *amicus* his mental health. The government would have it cost him his appellate rights as well.

D. The government relies almost exclusively on *Bowles* v. *Russell*, 551 U.S. 205 (2007). But *Bowles* did not establish a categorical rule that all timing of review

provisions are jurisdictional. Such a reading of *Bowles* would make no sense in light of the text, structure, and purposes of veterans benefits statutes generally and the Veterans Judicial Review Act specifically. And this case presents none of the separation-of-powers or finality concerns raised by *Bowles*. Such considerations, not an over-reading of *Bowles*, control the outcome here.

ARGUMENT

Since well before this Nation's founding, countries have provided compensation and benefits to veterans injured while serving their country. Those benefits serve both as inducement for loyal service and compensation for sacrifices made. Consistent with those purposes, veterans benefits and compensation are awarded through a system that offers "special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1707 (2009). "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Ibid.* The veteran has made extreme sacrifices for the Nation. The Nation, in turn, acts with a corresponding spirit of gratitude and generosity in repayment of those sacrifices. As President Lincoln proclaimed in closing his second inaugural address, it is the Nation's duty "to care for him who shall have borne the battle and for his widow and his orphan." U.S. Gov't Printing Office, *Inaugural Addresses of the Presidents of the United States* 142, 143 (1989).

The modern veterans benefits system and this Court's cases construing it resonate with that same theme. Veterans seeking benefits are not subjected to an adversarial process; they are supposed to encounter a cooperative system in which the Secretary of Veterans Affairs "make[s] reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's

claim for a benefit." 38 U.S.C. §5103A(a)(1). The Secretary must assist a claimant in "obtain[ing] relevant records" that would support his claim, *id.* §5103A(b)(1), and in "providing a medical examination or obtaining a medical opinion" as necessary, *id.* §5103A(d). And when the issues are sufficiently close, "the benefit of the doubt" must be given to the veteran. *Id.* §5107(b).

Decisions denying benefits can be appealed to the Board of Veterans' Appeals, 38 U.S.C. §§7104-7107, which likewise uses a "nonadversarial" system, 38 C.F.R. §20.700(c). Further appeals to the Veterans Court are likewise replete with pro-claimant features. Only veterans can seek review of Board decisions; "[t]he Secretary may not seek review." 38 U.S.C. §7252(a). And Veterans Court decisions must "take due account of the Secretary's application of section 5107(b)," *id.* §7261(b)(1), which requires the Secretary to "give the benefit of the doubt to the claimant" when "there is an approximate balance of positive and negative evidence," *id.* §5107(b).[4] Moreover, this Court's cases require that doubtful questions of statutory construction must "be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Statutory provisions must be given "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

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[4] While veterans may hire counsel, the fee agreement must be filed with the court, which can reduce any fee that "is excessive or unreasonable." 38 U.S.C. §§7263(b)-(d). Most veterans proceed without counsel. Since 2000, the annual percentage of claimants unrepresented by counsel when filing with the Veterans Court ranged from just over half to just over two-thirds. See Pet. Br. 8.

Notwithstanding those principles, the Federal Circuit gave the 120-day time limit for seeking Veterans Court review a construction that is not merely distinctly ungenerous to veterans, but also imposes a legal disability in consequence of the physical disabilities the veteran suffered while serving the Nation. Under this Court's cases, "limitations periods are customarily subject to equitable tolling" where, for example, circumstances beyond the litigant's control prevent him from meeting the deadline. *Young* v. *United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted). But the government and the decision below claim that the general rule does not apply to the deadlines imposed on veterans seeking review in the Veterans Court. Congress, they insist, precluded equitable tolling by making that deadline jurisdictional. Thus, under their view, a veteran's failure to meet the deadline always forfeits his claims. Indeed, the Veterans Court applied that rule to dismiss *amicus*'s claims even after concluding that the very service-related injury for which he was seeking compensation—"recurrent temporal disorientation" that causes him to "lose" significant "passages of time (days, perhaps weeks)"—also caused him to miss the deadline for further review.

That approach does not merely defy the statute's text, which is inconsistent with an intent to establish a jurisdictional deadline. Nor does it merely contravene the canon requiring statutes to be construed generously in favor of the veteran. It is also flatly inconsistent with the spirit of gratitude and generosity this Nation traditionally displays in the treatment of those who have sacrificed so much.

A. Section 7266(a)'s Text Demonstrates That Its Timing Requirement Is Not Jurisdictional

For generations, this Court has recognized that the web of statutes addressing veterans benefits must be construed, where possible, in the veterans' favor. Even apart from that canon, however, the Federal Circuit's decision to construe the 120-day time limit in 38 U.S.C. § 7266(a) as a harsh and inflexible trap for injured veterans cannot be sustained. As this Court has explained, it "is hornbook law that limitations periods are customarily subject to equitable tolling, * * * unless tolling would be inconsistent with the text of the relevant statute." *Young* v. *United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted). Here, nothing in the text of § 7266(a) makes the 120-day deadline a "jurisdictional" limit that cannot be tolled. To the contrary, this Court's decisions demonstrate that such a label is inappropriate. Section 7266(a) by its terms does not address itself to "jurisdiction" or the power of the court to adjudicate a case. It addresses itself instead to the obligations of a party.

1. This Court in recent years has become more critical of the sometimes "profligate" use of the term "jurisdictional," *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 510 (2006), and has "attempted to brush away confusion introduced by * * * earlier opinions," *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005). The primary lesson that has emerged from the Court's more recent cases is that subject-matter jurisdiction at its core "involves *a court's power* to hear a case." *Arbaugh*, 546 U.S. at 514 (emphasis added) (quotation marks omitted); see also *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 89 (1998); *Black's Law Dictionary* 853 (6th ed. 1990) ("jurisdiction" refers to "the power of the court to decide a matter in contro-

versy"). Consequently, the principal textual determinant of whether a provision is jurisdictional is whether the statute by its terms addresses the *power of a court* to hear a case; such statutes are typically jurisdictional. By contrast, a statute that merely imposes requirements or obligations on a party will rarely be jurisdictional.

As this Court has explained, a statutory provision that "delineat[es] the classes of cases * * * *falling within a court's adjudicatory authority*" is likely to be construed as jurisdictional. *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004) (emphasis added). Similarly, where Congress enacts a statute that expressly uses the term "jurisdiction"—a word that inherently connotes power or scope of authority—the statute is also likely jurisdictional. See, *e.g.*, *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 467-468 (2007). The federal-question statute represents a textbook example. It states that "[t]he district *courts* shall have *original jurisdiction*" over particular cases, namely "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (emphasis added). Likewise, the diversity statute gives "district *courts* * * * *original jurisdiction*" over "civil actions" with diverse parties and an amount in controversy exceeding $75,000. *Id.* § 1332(a) (emphasis added). In both provisions, Congress delineated the classes of cases falling within a court's adjudicatory authority. Both are therefore jurisdictional. See *Arbaugh*, 546 U.S. at 513, 515.

Conversely, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U.S. at 516. Accordingly, when a provision speaks not to the "power of the court" but to "the rights or obligations of the parties," it is ordinarily non-

jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1243 (quotation marks omitted). As the United States explained in its *amicus* brief in *Reed Elsevier*, a statutory provision is non-jurisdictional if it "does not speak in jurisdictional terms" and—instead of addressing the power of the court—"establishes steps that *a [party] must take* before filing suit." U.S. Br. in No. 08-103, at 14 (June 2009) (emphasis added). Even though the statute in *Reed Elsevier* established certain mandatory steps for the party in "emphatic terms," the government explained, not even emphatic language can convert a statute that "speaks to the obligations of the parties rather than the power of the court" into a jurisdictional limit. *Id.* at 14, 15.

2. This Court's cases have repeatedly recognized that distinction—between statutes that "define[] the court's authority to hear a given type of case," and those that impose mandatory obligations on litigants—when distinguishing jurisdictional from non-jurisdictional provisions. See *Carlsbad Tech., Inc.* v. *HIF Bio, Inc.*, 129 S. Ct. 1862, 1866 (2009) (quotation marks omitted). In *Arbaugh*, for example, the Court addressed "whether the numerical qualification contained in Title VII's definition of 'employer' affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief." 546 U.S. at 503. The Court unanimously held that the statute, which provided that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees," was non-jurisdictional. *Id.* at 504. The 15-employee requirement, this Court reasoned, "'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Ibid.* (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

In *Reed Elsevier*, the Court likewise addressed whether a copyright holder's failure to comply with a statutory registration requirement was jurisdictional. The statute there provided that "*no civil action* for infringement of the copyright in any United States work *shall be instituted* until preregistration or registration of the copyright claim has been made in accordance with this title." 130 S. Ct. at 1245 (emphasis added). The Court held that the statute was non-jurisdictional because it did not "'clearly state[ ]' that its registration requirement is 'jurisdictional,'" and did not otherwise "'speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id.* at 1245-1246 (quoting *Arbaugh*, 546 U.S. at 515). Instead, it imposed a pre-filing requirement on the plaintiff, the party that traditionally "institute[s]" a "civil action for infringement." *Id.* at 1245.

Similarly, in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), the Court again addressed a statute focusing on the behavior of the parties rather than the authority of the court. The statute there stated that, "[w]ithin thirty days of receipt of notice of final action taken by * * * the EEOC * * * *an employee or applicant for employment* * * * *may file* a civil action as provided in section 2000e-5 of this title." *Id.* at 94 (emphasis added). This Court again held that the statute was non-jurisdictional and therefore subject to equitable tolling. *Id.* at 95-96.

Finally, in *Bowen* v. *City of New York*, 476 U.S. 467 (1986), this Court held that a provision of the Social Security Act requiring a claimant to appeal an agency denial of benefits within a specified time period was not jurisdictional. *Id.* at 480-482. The statute in *Bowen* likewise focused on the steps a party must take to have her case heard, declaring that "*[a]ny individual*" contesting a So-

cial Security benefits determination "*may obtain a review* of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." *Id.* at 472 n.3 (emphasis added); see also *Carlisle* v. *United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction.'").

By contrast, in *Bowles*, the Court confronted a statute that by its terms addressed the authority of the court. The statutory provision there declared that "*no appeal shall bring* any judgment, order or decree in an action, suit or proceeding of a civil nature *before a court of appeals* for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." 28 U.S.C. §2107(a) (emphasis added). That language is not a direction to the parties but a declaration regarding judicial power. It proclaims that an appeal is incapable of bringing the determination below before the appellate court unless the required notice is filed within 30 days. Congress's express provision of a mechanism to extend the 30-day period in §2107(c) reinforced that conclusion. That is true not merely because the inclusion of an express exception to the 30-day requirement implies the absence of other, unlisted exceptions. It is also true because Congress, in making the exception, once again directed itself not to the obligations of the parties but to the *power of the court.* A "district court," Congress provided, can "reopen the time for appeal" within 180 days of judgment for a period of 14 additional days in certain circumstances. *Id.* §2107(c); see also Fed. R. App. P. 4(a)(6). Because the text of those provisions "*prohibits federal courts from adjudicating* an otherwise legitimate

'class of cases' after a certain period has elapsed from final judgment," the Court concluded that they are jurisdictional. *Bowles*, 551 U.S. at 213 (emphasis added); see also *Browder* v. *Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 264 (1978).

3. The provision at issue here, 38 U.S.C. §7266(a), parallels the provisions this Court held to be non-jurisdictional in *Arbaugh*, *Reed Elsevier*, *Irwin*, and *Bowen*, but is wholly unlike the statute held jurisdictional in *Bowles*. Like the statutes in the former cases and unlike the statute in *Bowles*, §7266(a) is not framed as an express limit on the authority of the reviewing court. To the contrary, it focuses on what the veteran must do. It provides that, "[i]n order to obtain review by the Court of Appeals for Veterans Claims * * * *a person adversely affected by such decision shall*" take certain steps. 38 U.S.C. §7266(a) (emphasis added). Because §7266(a) "merely establishes steps that a [party] must take before filing suit," U.S. Br. in No. 08-103, at 14 (June 2009), it is a paradigmatic example of the sort of statute that ought not be considered jurisdictional.

The court below "recognize[d] that while 28 U.S.C. §2107, the statute at issue in *Bowles*, is phrased in terms of what the district court can and may do, §7266(a) is phrased in terms of the actions a veteran must take to preserve his or her right to appeal." Pet. App. 39a. But the court nonetheless concluded that §7266(a) was jurisdictional. *Ibid.* That conclusion simply ignores the fundamental nature of "jurisdiction"—that it speaks to the power of courts, not the obligations of litigants appearing before them. Because Congress "d[id] not speak in jurisdictional terms or refer in any way to the jurisdiction" of the federal court, *Zipes*, 455 U.S. at 394, and spoke to

the obligations of the parties instead, *Reed Elsevier*, 130 S. Ct. at 1243, § 7266(a) is non-jurisdictional.

Had Congress intended § 7266(a)'s time limit to be jurisdictional, it could have easily achieved that result. Congress could have, for example, echoed the statute in *Bowles* by providing that "no appeal shall bring any final decision of the Board of Veterans' Appeals before the Court of Appeals for Veterans Claims unless notice of appeal is filed within 120 days after the date on which notice of the decision is mailed." Cf. 28 U.S.C. § 2107(a). Or Congress could have provided specific exceptions to that time limit and framed them in terms of judicial authority, making clear that courts had neither authority over cases not brought within the time limit set forth nor authority to infer the existence of unlisted exceptions. Cf. 28 U.S.C. § 2107(c). But a naked direction to an individual to undertake particular actions by a particular deadline, without any further detail, falls irremediably short of demonstrating a congressional intent to impose an exceptionless jurisdictional requirement that is immune from the ordinary background principles and exceptions that Congress is presumed to understand, accept, and incorporate into its laws.[5]

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[5] In *Missouri* v. *Jenkins*, 495 U.S. 33 (1990), this Court held that a statute was jurisdictional where it provided that "[a]ny other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." *Id.* at 45; see 28 U.S.C. § 2101(c). Unlike that provision, however, § 7266(a) specifically identifies to whom it is directed—the litigant rather than the court—by stating that the "person adversely affected" must file his notice within 120 days. The statute in *Jenkins*, moreover, provided that a Member of this Court, "for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." See

B. The Decision Below Cannot Be Reconciled With Either The Canon Requiring Ambiguity To Be Resolved In The Veteran's Favor Or The Humane Principles The Canon Reflects

This Court has long applied the rule of construction that, in statutes dealing with veterans benefits, any "interpretive doubt is to be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). For the reasons given above, this Court need not resort to that canon: Section 7266(a)'s text by itself demonstrates that it is non-jurisdictional. To the extent § 7266(a) is not unambiguously non-jurisdictional, however, it surely cannot be deemed unambiguously jurisdictional. Section 7266(a) nowhere designates its time limits as jurisdictional; it does not frame them as limits on the power of courts; and it certainly does not do so unmistakably. Any ambiguity must therefore be resolved in the veteran's favor.

1. The canon requiring courts to construe veterans statutes liberally and compassionately in favor of veterans reflects a principle almost as old as government and

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495 U.S. at 44 n.12 (citing 28 U.S.C. § 2101(c)). Because Congress had provided for a specific exception to the deadline—as it did in 28 U.S.C. § 2107(c), a provision addressed in *Bowles*—it would have been inappropriate for this Court to imply more exceptions. Similarly, in *Stone* v. *INS*, 514 U.S. 386 (1995), this Court held that a motion for reconsideration of a Board of Immigration Appeals decision does not toll the requirement that "a petition for review [of a final deportation order] * * * be filed not later than 90 days after the date of the issuance of the final deportation order." *Id.* at 390, 405. There, however, Congress was acting for the specific purpose of expediting the removal of aliens and "to redress the related problem of successive and frivolous administrative appeals and motions." *Id.* at 400; see Pet. Br. 50. Engrafting judicially created exceptions onto the statute would have defied Congress's intent. A similar desire to impose harsh and exceptionless time limits on those who have afforded the Nation loyal service cannot be inferred here.

war—that the body politic for whom the soldier risks life and limb should exhibit a spirit of gratitude and generosity for those sacrifices. The "practice of compensating war veterans and disabled soldiers dates back to antiquity." Library of Congress Federal Research Division, *Veterans Benefits and Judicial Review* 2 (1992) ("*Veterans Benefits & Judicial Review*"). Egyptian Pharaohs made sure that their soldiers were given "plots of land, depending on the extent and character of their service." *Ibid.* In Ancient Greece, "[s]oldiers wounded in battle were fed at public expense, and pensions were granted to those who could prove permanent injury." *Ibid.* Rome likewise provided pensions for disabled soldiers financed in part "by proceeds from taxes on public sales." *Id.* at 3.

A similar spirit of gratitude and generosity pervades European history. French King Phillip II "founded a hospice for veterans who had participated in the Crusades." *Veterans Benefits & Judicial Review*, *supra*, at 4. Other examples of pre-modern European veterans benefits abound. See, *e.g.*, *id.* at 9-10 (Russia); *id.* at 10-11 (Germany). In short, "[t]he care of the poor, sick, and maimed soldiers and sailors who had served in wars had occupied the attention of European countries for several centuries." Gustavus A. Weber & Laurence F. Schmeckebier, *The Veterans' Administration: Its History, Activities and Organization* 3 (1934).

England adopted the same attitude. The King of the West Saxons provided land grants to veterans as early as the end of the 9th century. *Veterans Benefits & Judicial Review*, *supra*, at 13. The English Parliament enacted a series of laws toward the end of the 16th century that provided relief to disabled soldiers. *Id.* at 14. And, during Queen Elizabeth I's reign, the "veterans of Sir Francis Drake's forces" were awarded pensions "in gratitude

for Drake's defeat of the Spanish Armada." William F. Fox, Jr. *The Law of Veterans Benefits: Judicial Interpretation* 3 (3d ed. 2002); see also H.R. Rep. No. 100-963, at 9 (1988).

That same tradition of grateful generosity crossed the Atlantic to the new colonies. In 1636, the General Court of the Plymouth Colony passed a statute providing for lifetime benefits to injured soldiers. *Veterans Benefits & Judicial Review*, *supra*, at 21. Many colonies followed suit. See *id.* at 24 (Virginia); *id.* at 25 (Maryland); *id.* at 25-26 (New York); *id.* at 26-27 (New Hampshire); *id.* at 27 (New Jersey); *id.* at 28 (Rhode Island); *id.* at 22 (figure entitled "Veterans Benefits in the Thirteen Colonies, 1764"); H.R. Rep. No. 100-963, at 9 (1988). Thus, "[t]he English colonies in America, following the custom of the mother country, introduced pension systems for disabled veterans almost at the beginning of the colonization." Weber & Schmeckebier, *supra*, at 3.

Throughout the revolutionary period and the ensuing 200 years of this Nation's history, Congress adhered to the same spirit. The Continental Congress resolved to allow States to charge it for payments made to Continental Army soldiers disabled during the Revolutionary War. 5 *Journals of the Continental Congress 1774-1789*, at 702-705 (1906). Troops serving in state militias were often granted benefits as well. *Veterans Benefits & Judicial Review*, *supra*, at 37-39. Gradually, Congress consolidated the benefits process with the federal government. See *id.* at 40-45 (discussing various statutes); Weber & Schmeckebier, *supra*, at 7-9, 18-19, 26-27. By the time the Civil War ended, no one could possibly quibble with President Lincoln's proclamation that it was the country's duty "to care for him who shall have borne the battle and for his widow and his orphan." U.S. Gov't

Printing Office, *Inaugural Addresses of the Presidents of the United States* 142, 143 (1989). The phrase would later become the motto of the Department of Veterans Affairs.

Even though "[p]ensions for the nation's war veterans" had by 1880 grown to become "the single largest expenditure of the Federal government" and consumed more than one-third of the federal budget by 1890, *Veterans Benefits & Judicial Review*, *supra*, at 59, the national commitment to caring for veterans did not abate. After World War I, the "trend of liberalizing veterans benefits" continued. Library of Congress Federal Research Division, *The Veterans Benefits Administration* 20 (1995). And even though the number of veterans grew by over 300% between 1942 and 1947, see *id.* at 35, Congress continued to maintain and expand veterans benefits, including disability benefits, in the post-World War II era, *id.* at 29-62.

The right to judicial review established in 1988 through §7266(a) reflected that same national commitment to caring for veterans who have rendered faithful service. During the early days of the Republic, Congress "intended that the courts play an active role in the administration of a veterans' benefit system," but "[f]ederal courts had refused to exercise that power." *Veterans Benefits & Judicial Review*, *supra*, at 45.[6] As a result, decisionmaking authority was vested with the Secretary of War, and later in the Veterans Administration. Dissatisfied with the consequences of unreviewed and unre-

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[6] In 1792, Congress "imposed" "the duty of deciding whether a veteran's disability was service-connected, and if so, the extent of his disability, on the Circuit Courts of the United States," but the judges "were mostly of the opinion that Congress could not require the judiciary to make such determinations." H.R. Rep. No. 100-963, at 9 (1988).

viewable agency determinations, Congress established a right to judicial review when it enacted the Veterans Judicial Review Act. See Pub. L. No. 100-687, 102 Stat. 4105 (1988). That Act—which created the Veterans Court along with §7266(a)'s 120-day deadline—was spurred by "Congress' abiding concern that individuals who had put their lives on the line through service in the military had no right to have their claims for disability benefits reviewed in a court of law." Pet. App. 67a (Mayer, J., dissenting). The "opportunity" for judicial review "[wa]s *necessary* in order to provide such claimants with *fundamental justice*." S. Rep. No. 100-418, at 50 (1988) (emphasis added); see also *id.* at 29-31; H.R. Rep. No. 100-963, at 9-10 (1988).

2. The canon requiring courts to construe veterans statutes generously in favor of the veteran when possible arises out of the same commitment to wounded veterans. This Court has "recognize[d] that Congress has expressed special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1707 (2009). "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Ibid.* Consistent with that statutory commitment, this Court has long applied the canon "that interpretive doubt is to be resolved in the veteran's favor." *Brown*, 513 U.S. at 118. Under that canon, courts "construe[ing] the separate provisions of the Act" must "give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); see also *Ala. Power Co.* v. *Davis*, 431 U.S. 581, 584 (1977).

That canon dates from early in the Nation's history. For example, this Court invoked the canon more than 150

years ago in *Walton* v. *Cotton*, 60 U.S. (19 How.) 355 (1856). Recognizing that Congress had established the veterans benefits at issue "from high motives of policy" and in "gratitude" for the veterans' loyal service, the Court declared that, "where the language used" by Congress "may be so construed as to carry out a benign policy, it should be done." *Id.* at 358.

In that case, the question was whether Congress, in authorizing payments to the "children" of a deceased veteran, intended such benefits to be paid to "grandchildren" where the veteran died "leaving no widow or children, but [only] grandchildren." 60 U.S. at 358. In the context of wills, the Court observed, the word "children" had sometimes been "held to mean grandchildren." *Ibid.* The Court explained that Congress had granted the benefits to "alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered." *Ibid.* In light of that purpose, the Court rejected the claim that the term "children" excludes "grandchildren," reasoning that to withhold the benefits from the veteran's grandchildren, "who had the misfortune to be left orphans, * * * would not seem to be a fit discrimination of national gratitude." *Ibid.* To deny payment to veterans' offspring whenever "a male pensioner dies, leaving no widow or children, but grandchildren," the Court continued, "would seem to stop short of carrying out the humane motive of Congress." *Ibid.* Invoking the rule that the statute must be "construed to carry out a benign policy" and the principle that Congress "will be presumed to have acted under the ordinary influences which lead to an equitable and not a capricious result," the Court held that "the word children, in the acts, embrace[s] the grandchildren" of the veteran as well. *Ibid.*

Since then, this Court has repeatedly invoked the canon requiring any ambiguity in a veterans statute to be construed in favor of the veteran. See, *e.g.*, *Brown*, 513 U.S. at 117-118 (disability benefits statute); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991) (stating in the context of a reemployment provision that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980) ("The [Vietnam Era Veterans' Readjustment Assistance Act of 1974] is to be liberally construed for the benefit of the returning veteran."); *Fishgold*, 328 U.S. at 284-285 (Selective Training and Service Act of 1940). This Court and others have not hesitated to invoke the canon in a variety of contexts, whether procedural, substantive, or both. See *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943) (Act containing a provision permitting a stay of proceedings when a veteran is involved "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"); *Landsman* v. *United States*, 205 F.2d 18, 22 n.14 (D.C. Cir. 1953) ("If there were room for dispute, the humanitarian nature" of legislation allowing for veterans to make a timely application for a waiver of insurance premiums based on disability "would point to a liberal interpretation, in aid of the veteran."). This Court must, moreover, "presume congressional understanding of such interpretive principles" when construing a veterans benefit provision. *St. Vincent's*, 502 U.S. at 221 n.9.

3. To the extent § 7266(a) is not unambiguously nonjurisdictional, the canon requiring veterans statutes to be construed liberally in favor of the veteran must control this case. Whatever debate there can be about the proper construction of § 7266(a)'s text, that text surely

does not unambiguously establish the 120-day limit as jurisdictional. Under this Court's cases, *any* "interpretive doubt" must be resolved in favor of the veteran. *Brown*, 513 U.S. at 118; *Sanders*, 129 S. Ct. at 1709 (Souter, J., dissenting) (noting "Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions").

Application of that canon is particularly appropriate given the extreme and inequitable consequences the contrary construction would impose. The whole point of the veterans benefits system is to provide compensation to those who suffer a disability while serving this Nation. And the point of providing further review was Congress's conclusion that it was critical to due process and fundamental fairness. See pp. 19-20, *supra*. Sometimes, however, the same disability that impairs the veteran's general functioning can also prevent her from meeting statutory deadlines. The government would construe the statute so that the very injury for which Congress sought to provide compensation can become the reason the veteran loses her rights to judicial review and compensation alike. That approach does not merely fall short of the "humane motive of Congress" that underlies veterans benefits programs. *Walton*, 60 U.S. at 358. It also would "frustrate the purposes" of the Veterans Judicial Review Act "and, in effect, cause the act to destroy itself." *Baltimore & Ohio R.R. Co.* v. *Pitcairn Coal Co.*, 215 U.S. 481, 494 (1910). That is especially true considering that many veterans file their notices of appeal without the assistance of counsel.[7] Whatever else it intended, Congress

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[7] "Because so many veterans must file their petitions without the assistance of counsel, it is highly unlikely that Congress intended for section 7266(a) to serve as a harsh and inflexible jurisdictional bar."

plainly did not want the severity of the disability for which the veteran seeks compensation to become the very reason the veteran—often unaided by counsel—ends up being denied judicial review.

C. *Amicus*'s Circumstance Demonstrates Precisely Why Congress Could Not Have Intended The Government's Construction

The concern identified by *amicus* above—that the very injury for which a veteran seeks compensation might become the reason he cannot obtain it—is hardly hypothetical. The Veterans Court has already ruled that *amicus* missed the deadline precisely because of his disability, but refused equitable tolling nonetheless.

A Vietnam veteran, *amicus* suffered numerous injuries during his time in uniform and was honorably discharged. He has sought to establish entitlement to benefits for the service-connected disabilities that resulted from those injuries. One of the disabilities he has been diagnosed with—"recurrent temporal disorientation"—has "worsened over the years" and "significantly disrupt[s] his capacity to carry out routine daily activities in a consistent manner." *Halseth* v. *Nicholson*, No. 05-3646, 2006 WL 1523106, at *1 (Vet. App. June 1, 2006); Vet. Ct. Case No. 05-3646, Apr. 10, 2006 Dkt. Entry, at 2. As a result of those deficits, *amicus* loses track of days and

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Pet. App. 69a (Mayer, J., dissenting); cf. *Zipes*, 455 U.S. at 397 (reading a timing deadline as jurisdictional "would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process'"). Interpreting the time limit in § 7266(a) would thus fly in the face of a system in which veterans, often unassisted by lawyers, must navigate through the statutory and regulatory labyrinth in order to receive benefits due for their service to the country.

even weeks; time just disappears. 2006 WL 1523106, at *1-2.

It was that disability (among others) for which *amicus* sought compensation. And it was that disability that caused him to miss the 120-day deadline. After an adverse decision from the Board of Veterans' Appeals, *amicus* appealed—without counsel—to the Veterans Court one month outside § 7266(a)'s 120-day window. Relying on then-existing *en banc* Federal Circuit precedent, the Veterans Court determined that *amicus* would be entitled to equitable tolling if he proved he had a disability that prevented him "from handling his own affairs or functioning in society" if "his failure to file a timely [notice of appeal] was the direct result of [that] diagnosed mental illness." Feb. 17, 2006 Dkt. Entry, at 2. After reviewing evidence from *amicus*'s physician regarding *amicus*'s recurrent temporal disorientation, the Veterans Court determined that his disability had prevented him from meeting the deadline. The "evidence presented in this case," the Court ruled, "is sufficient to warrant equitable tolling." 2006 WL 1523106, at *2. Accordingly, on June 1, 2006, the Veterans Court ordered that *amicus*'s notice of appeal be considered timely. *Ibid.*

Two years later, however, the Veterans Court invoked this Court's decision in *Bowles* to hold that § 7266(a) categorically bars equitable tolling. See *Henderson* v. *Peake*, 22 Vet. App. 217 (2008). Citing that ruling, it then dismissed *amicus*'s appeal. See *Halseth* v. *Peake*, No. 05-3646, 2008 WL 3978971 (Vet. App. Aug. 21, 2008). The Veterans Court did not retreat from its ruling that *amicus* suffers from a neurocognitive disability. Nor did it retreat from the conclusion that *amicus* had demonstrated that "his failure to file a timely [notice of appeal] was the direct result of [that] diagnosed mental illness."

Rather, it extended *Bowles* and concluded that § 7266(a)'s deadline is a bright-line, exceptionless rule that forecloses any tolling under any circumstance.

Amicus's injuries have cost him his mental health. He should not lose his appellate rights as well. If allowed to stand, the decision below will close the doors to veterans like *amicus* who miss a deadline through no fault of their own and, indeed, as a result of the injuries they suffered while serving the Nation. It is utterly implausible that Congress—prompted by the "humane motive" and spirit of gratitude underlying the Nation's veterans statutes—intended that harsh result.

D. *Bowles* Does Not Compel A Contrary Result

While the government has urged the contrary construction on the Court, see Br. in Opp. 5-13, *amicus* presumes that it does so reluctantly. The government, of course, has no interest in denying injured veterans the benefits that are their due; it does not seek to enrich the federal fisc at the expense of the wounded. The government likewise does not suggest that it would be in keeping with the policy of "national gratitude" and the "humane motive" of Congress in enacting these statutes to construe them to deny the veteran his day in court. Nor does the government urge that it is compelled to adopt its current position based statutory text, or on the positions it has taken in the past. Instead, the government mistakenly reads this Court's decision in *Bowles* as compelling the conclusion that § 7266(a) must be jurisdictional because all provisions setting forth time limits for appellate review are necessarily jurisdictional.

1. This Court's cases foreclose the government's reading of *Bowles*. For example, in *Bowen* v. *City of New York*, 476 U.S. 467 (1986), this Court addressed a statute that allowed an individual contesting a benefits determi-

nation under the Social Security Act to "obtain a review" of that determination by filing suit within a given time period. This Court concluded that the time limit in that statute was non-jurisdictional. *Id.* at 480-482; see pp. 12-13, *supra*. *Bowen* precludes any reading of *Bowles* as establishing a categorical rule, regardless of what the particular statute governing the particular appeal by the particular type of litigant actually says.

Moreover, in a thorough and recent exposition of jurisdiction before this Court in *Reed Elsevier*, the United States argued *against* any categorical rule and *for* an emphasis on the text of a particular statute. See U.S. Br. in No. 08-103 (June 2009). In doing so, the United States asserted that a jurisdictional requirement is one that "define[s] the scope of the courts' adjudicatory power." *Id.* at 12. By contrast, rules that "address matters other than the courts' power to decide," even if they are "important and categorical, are not jurisdictional." *Ibid.* According to the United States, that dichotomy—along with a "century's worth of precedent"—drove this Court's holding in *Bowles*. *Id.* at 16 & n.7. Because the statute in *Bowles* "sp[oke] to the power of the court of appeals (rather than to the behavior of the litigant) by stating that an untimely notice of appeal will not bring the case to the court," the ordinary civil notice-of-appeal deadline was jurisdictional. *Id.* at 16 n.7.

Consistent with the United States' position in *Reed Elsevier*, *Bowles* should not be read to announce a categorical rule applicable to all timing-of-review provisions, irrespective of what a particular provision actually says. Quite the contrary, *Bowles* reaffirmed the elementary principle that text matters. And when the text of a timing provision speaks to the power of a court—as it did in *Bowles*—then the statute may be viewed as jurisdic-

tional. But when the text of a timing provision speaks to the behavior of a party—as is the case here—the statute is non-jurisdictional.

That principle applies with special force to statutes, like §7266(a), that are of recent vintage. In addition to text, *Bowles* emphasized "that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1248. For generations, the timing-of-review provisions for appealing *to an Article III appellate court*, like the provisions at issue in *Bowles*, have been construed as "mandatory and jurisdictional." *Bowles*, 551 U.S. at 209. To the extent that there existed any doubt in the text of the statute in *Bowles*, it was removed by those precedents. By contrast, the intra-Executive Branch review of the veterans claims at issue here only dates to 1988. There is no history of construing that sort of provision for intra-Executive Branch review as jurisdictional. Instead, given this Court's decision in *Bowen* just two years before §7266(a)'s enactment, Congress almost certainly would have considered a provision providing for such review non-jurisdictional.

2. *Bowles* is wholly inapposite for another reason. It neither involved nor even referenced any statutes or rules governing intra-Executive Branch review by an Article I court.[8] It instead concerned whether this Court

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[8] *Bowles* repeatedly referenced review by Article III courts only. See, *e.g.*, 551 U.S. at 210 ("[E]ven prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction."); *ibid.* ("[T]he courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction."); *id.* at 213 ("Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction."); *ibid.* ("Because Congress spe-

should interpret a statutory provision to allow an Article III court to equitably expand the scope of judicial authority. Construing the statute in *Bowles* to allow for equitable tolling, in other words, would have expanded the power of federal courts to countermand Executive determinations. Such judicial enlargement of the judiciary's own powers, at the expense of another branch of government, implicates separation-of-powers concerns. For that reason, the "jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 164 (2008). Here, by contrast, construing § 7266(a) as allowing for equitable tolling would not enlarge the scope of Article III authority. It would provide for further review by the Executive Branch. There is thus no concern about one branch aggrandizing power at the expense of another.

Citing *United States* v. *Denedo*, 129 S. Ct. 2213 (2009), the Federal Circuit insisted that *Bowles* applies here with *greater force* because it involved an appeal to an Article I tribunal. Pet. App. 37a-38a. In *Denedo*, this Court reaffirmed that "it is for Congress to determine the subject-matter jurisdiction of federal courts." 129 S. Ct. at 2221. And it stated that "[t]his rule applies with added force to Article I tribunals." *Ibid.* But that merely reflects the unexceptional truism that, while Congress has broad (but constitutionally defined) authority to determine the scope of federal court jurisdiction, it has even greater control over the scope of authority of the quasi-judicial bodies it creates within the Executive Branch, since those tribunals "owe their existence to Congress'

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cifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple 'claim-processing rule.'").

authority to enact legislation pursuant to Art. I, § 8 of the Constitution." *Ibid.* It does not and logically cannot mean that a decision construing a statute that regulates authority within the Executive Branch is more fraught with separation-of-powers peril than a decision that could have the effect of shifting power from the Executive to the Judiciary.

In any event, when Congress wants the Veterans Court to treat veterans the same as other litigants, it expressly says so. For example, this Court has recently concluded that "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases" applies to the Veterans Court as well. *Sanders*, 129 S. Ct. at 1704. But that holding resulted from Congress's choice to "use[] the same words in the Administrative Procedure Act," which governs harmless error in administrative law cases, as in the statute governing harmless error in the Veterans Court. *Ibid.* Moreover, "[l]egislative history confirm[ed] that Congress intended the Veterans Court 'prejudicial error' statute to 'incorporate a reference' to the APA's approach." *Ibid.* Because there was "no indication of any relevant distinction between the manner in which reviewing courts treat civil and administrative cases," this Court applied "general case law governing application of the harmless-error standard." *Ibid.*

Here, however, Congress did not "use[] the same words" in § 7266(a) that it previously used in the provisions at issue in *Bowles*. It used quite different language that addressed what veterans must do and when. And there is absolutely nothing in the legislative history of the Veterans Judicial Review Act to indicate that Congress intended to preclude equitable tolling. For that reason too, § 7266(a) is non-jurisdictional.

3. Finally, the reasons for making the deadlines for ordinary civil appeals jurisdictional simply have no application here. In ordinary civil litigation, strict deadlines protect a party's reasonable expectations of repose and prevent it from operating in the shadow of uncertainty. Finality serves "'to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands.'" *Browder* v. *Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 264 (1978).

By contrast, in the veterans benefits context, Congress has given finality a diminished role. For example, "[n]o statute of limitations bars the filing of an application for benefits, and the denial of an application has no formal *res judicata* effect." *Gambill* v. *Shinseki*, 576 F.3d 1307, 1315 (Fed. Cir. 2009) (citing *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)). And if the Board denies a benefit, the veteran may ask, *at any time*, for it to reconsider. 38 C.F.R. §§20.1000-1001. It is highly improbable that Congress chose to allow a veteran to seek benefits over half a century after his time in uniform has ended, or seek reconsideration of a decision a decade after it was issued, but sought to make the 120-day limit for seeking review so inflexible as to deny the veteran his day in court if he misses the deadline by a single day because of the severe impairments that led the veteran to seek benefits in the first place. Yet that is the precise effect the decision below would have.

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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DAVID L. HENDERSON,
Petitioner,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERAN AFFAIRS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF THE *AMICI CURIAE* NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.; THE FEDERAL BAR ASSOCIATION, VETERANS LAW SECTION; AND VETERANS FOR COMMON SENSE IN SUPPORT OF PETITIONER

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32937

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. DISABILITY CLAIMS ARE BEING WRONGFULLY EXTINGUISHED AT A TIME OF GREAT NEED FOR THE NATION'S MILITARY VETERANS 5

A. Disability Benefits Provide A Vital Safety Net For Veterans Returning Home 6

B. The Veterans' Disability Claims Process Is Broken And Only Getting Worse 11

II. EQUITABLE TOLLING IS A VITAL SAFEGUARD IN A VETERANS' BENEFITS SYSTEM THAT ALREADY POSES SUBSTANTIAL AND UNWARRANTED BURDENS ON THE NATION'S VETERANS 16

III. THE DECISION BELOW FINDS NO SUPPORT IN THIS COURT'S PRECEDENT 24

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

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Astrue v. Ratcliff,
130 S. Ct. 2521 (2010) 14

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of the National Organization of Veterans' Advocates, Inc., The Federal Bar Association, Veterans Law Section, and Veterans for Common Sense.[1] These groups have extensive experience in assisting veterans in navigating the complex and vitally important veterans' disability benefits system and have a direct interest in the important question presented by this case.

The National Organization of Veterans' Advocates, Inc. ("NOVA") is a not for profit section 501(c)(6) educational organization incorporated in 1993. It is dedicated to training and assisting attorneys and non-attorney practitioners who represent veterans, their surviving spouses, and their dependants, before the Veterans Administration, the Board of Veterans' Appeals, the United States Court of Appeals for Veterans Claims ("Veterans Court"), the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), and this Honorable Court.

The Federal Bar Association ("FBA") is a tax exempt, 501(c)(6) organization, founded in 1920. The purposes of the FBA include: serving as the national representative of the Federal legal profession; promoting the sound administration of justice;

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of this brief. A letter of consent from counsel for respondent has been filed with the Clerk. Counsel for petitioner filed a blanket letter of consent to the filing of *amicus* briefs in this case with the Clerk on September 2, 2010.

enhancing the professional growth and development of members of the Federal legal profession; promoting high standards of professional competence and ethical conduct in the Federal legal profession; promoting the welfare of attorneys and judges employed by the Government of the United States; providing meaningful service for the welfare and benefit of the members of the Association; providing quality education programs to the Federal legal profession and the public; and keeping members informed of developments in their respective fields of interest.

The Veterans Law Section of The Federal Bar Association promotes and monitors the development of Veterans Law, adopts public positions on matters affecting veterans' status and dispute resolution, offers services, programs, and publications to persons in the legal profession with respect to Veterans Law, and promotes high standards of professional competence and ethical conduct in matters affecting veterans. The views expressed in this brief do not necessarily reflect those of The Federal Bar Association as a whole.

Veterans for Common Sense ("VCS") was formed in August 2002 as a non profit 501(c)(3) organization by war veterans who believe that the people of America are most secure when their country is free, strong, and responsibly engaged with the world. VCS's central mission is to raise the unique and powerful voices of veterans so that the nation's military, veterans, freedom, and national security are protected and enhanced for this generation and future generations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This is a critical time for the nation's military and its veterans. For nearly a decade, millions of brave

American men and women have been fighting simultaneous wars in Iraq and Afghanistan. These wars have lasted two to three times as long as American involvement in World War II, and they have not been without cost to the roughly two million Americans who have served there. Thousands have died for their country, and many thousands more have suffered serious injury, in places with names like Basra, Fallujah, Kandahar, Khanjar, Mazar-i-Sharif, Tikrit, and Tora Bora. The bravery and feats of these men and women are already the stuff of legend. *See, e.g.*, Marcus Luttrell, *The Lone Survivor: The Eyewitness Account of Operation Redwing and the Lost Heroes of SEAL Team 10* (2007). And far from winding down military operations, the nation's armed forces this past spring embarked on a new surge in Afghanistan—calling on some 30,000 additional troops to do battle against the nation's sworn enemies, including those who are responsible for, or who aided those responsible for, the vicious September 11 attacks.

To the thousands of injured veterans who return home from the fighting abroad, the VA claims system can at times seem as foreign and foreboding as the far away lands in which they have recently fought for their country. Instead of gratitude for their military service and care for their combat-related injuries, these men and women are too often greeted by their government with red tape, delay, and opposition to their disability claims. And as the facts of this case illustrate, the nation's veterans are often forced to attempt to navigate a Byzantine veterans' claims process without the benefit of counsel and even while encumbered by the very disabilities—including mental health injuries—for which they are seeking benefits. The

decision below eliminates a critical safeguard for veterans confronting that bureaucratic process—the equitable tolling doctrine long used to excuse claims filed outside the 120-day deadline imposed by 38 U.S.C. § 7266(a), such as where, as in this case, a veteran's own disability accounts for a missed deadline.

Amici agree with petitioner that the Federal Circuit's decision not only does an injustice to veterans "who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone v. Lightner*, 319 U.S. 561, 575 (1943), but is wrong on the merits. The Court's intervening decision in *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), underscores that the Federal Circuit erred in concluding that its decision was compelled by *Bowles v. Russell*, 551 U.S. 205 (2007). But *amici*'s central submission to this Court is that the interests of the nation's veterans are profoundly disserved by the decision below—a result that Congress could not have intended by passing a pro-veteran statute designed to ensure that every veteran received their "day in court." S. Rep. No. 100-418, at 31 (1988).

The wars in Iraq and Afghanistan have led to a spike in veterans' disability claims. In 2009 alone, more than a million new claims were filed with the VA. The rulings in this case—which eliminate the equitable tolling doctrine that has governed claims under Section 7266(a)—already have resulted in the dismissal of *hundreds* of veterans' claims. Unless that decision is corrected by this Court, these claims will be permanently extinguished. The gravity of that wrong is underscored by the fact that veterans routinely prevail when they are afforded an opportunity to challenge the denial of disability benefits—in roughly

80% of the cases challenging a final agency action denying benefits. In other words, the rule at issue is not simply leading to the dismissal of veterans' disability claims, it is in all likelihood sanctioning the dismissal of *meritorious* veterans' claims.

This nation has long abided by President Lincoln's admonition, in the Second Inaugural, "to care for him who shall have borne the battle and for his widow and orphan." And Congress has long appreciated that important responsibility, passing legislation providing benefits to disabled veterans "after every conflict in which the Nation has been involved." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Particularly in the context of Congress's longstanding recognition of this nation's obligation to its veterans, it is unthinkable that Congress would have intended that veterans could lose meritorious disability benefits claims because of a missed deadline under Section 7266(a) through no fault of their own. And there is no reason for the Court to reach that remarkable conclusion in this case.

ARGUMENT

I. DISABILITY CLAIMS ARE BEING WRONGFULLY EXTINGUISHED AT A TIME OF GREAT NEED FOR THE NATION'S MILITARY VETERANS

In every VA office is found the statement of General Omar Bradley that "[w]e are dealing with veterans, not procedures." U.S. Dep't of Veterans Affairs, *Leadership Covenant of the Veterans Benefits Administration* (June 28, 2002), *available at* http://www.vba.va.gov/VBA/about.asp. Yet, sadly, the VA claims process has become a procedural morass,

cutting off veterans—particularly those whose ability to navigate the system is limited *because* of their disabilities—from the critical disability benefits needed to regain stable footing in civilian life. The bureaucratic quagmire only has been exacerbated by the spike in disability claims as veterans return home from the ongoing conflicts abroad.

A. Disability Benefits Provide A Vital Safety Net For Veterans Returning Home

America has achieved great military success in Iraq and Afghanistan. But that success has come at a cost. Over 30,000 personnel have been wounded in action in Iraq since 2003, and nearly 8,000 in Afghanistan since 2001.[2] The most common disabilities for veterans who began receiving compensation for disabilities during fiscal year 2009 were physical, including tinnitus or hearing loss, and knee or back ailments. Veterans Benefits Administration, *Annual Benefits Report: Fiscal Year 2009* at 5, http://www.vba.va.gov/REPORTS/abr/2009_abr.pdf ("FY 2009 Annual Benefits Report"). But due to the unconventional nature of these conflicts, combat-related brain injuries and incidences of post-traumatic stress disorder similar to that suffered by the petitioner in this case (in connection with the Korean War) have proliferated. *See* Nema Milaninia, *The Crisis at Home Following the Crisis Abroad: Health Care Deficiencies for US Veterans of the Iraq and Afghanistan Wars*, 11 DePaul J. Health Care L. 327, 328-29 (2008).

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[2] *See* DoD Personnel & Procurement Statistics, *Military Casualty Information*, http://siadapp.dmdc.osd.mil/personnel/CASUALTY/castop.htm (last visited Mar. 25, 2010).

As the Commander in Chief has acknowledged, traumatic brain injury is "one of the signature injuries of these wars."[3] Indeed, it was estimated in 2008 that over *three hundred thousand* veterans received traumatic brain injuries during their deployments.[4] Moreover, "[a]pproximately 300,000 veterans of the Iraq and Afghanistan wars—nearly 20% of the returning forces—are likely to suffer from either PTSD or major depression, and these numbers continue to climb." *See* Vietnam Veterans of America & Veterans of Modern Warfare, *Veterans Fact Sheet* at 2 (2010), *available at* http://www.veteransnewsroom.com/files/press/VETERANS-Fact-Sheet-Veterans.pdf.

These often harder-to-see or treat injuries can significantly impact many veterans' jobs, relationships, or home life—and make it difficult or impossible for veterans to navigate the complex disability claims process. *See infra* at 17-24. Indeed, army researchers have found the rate of "serious functional impairment" from PTSD among American soldiers returning from service in Iraq to be as high as 14%. *See* Caroline Cassels, *High Rates of Severe Functional Impairment Found in Returning Soldiers Due to PTSD, Depression*, Medscape Medical News, June 15, 2010, http://www.medscape.com/viewarticle/723550. Female veterans are at even higher risk of PTSD. American Psychological Association, *Addressing the Mental and Behavioral Health Needs of Our Nation's Service*

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[3] The White House, *Veterans*, *available at* http://www.whitehouse.gov/issues/veterans (last visited Sept. 15, 2010).

[4] RAND Center for Military Health Policy Research, *Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans*, at 2 (Apr. 17, 2008).

Members, *available at* http://www.apa.org/about/gr/issues/military/need.aspx (estimating that at least 20-25% of women who served in Iraq will develop PTSD). In fact, according to recent VA statistics, PTSD and depression are the top disability claims among female veterans. Terry Gildea, *Combat Vet Says Gender Bias Led To Untreated PTSD*, Nat'l Pub. Radio, Mar. 21, 2010, http://www.npr.org/templates/story/story.php?storyID=124500733. Yet disturbingly, these women have faced particular challenges in obtaining care from the VA. *See id.*; Susan Donaldson James, *Traumatized Female Vets Face Uphill Battle*, ABCNews.com, Mar. 2, 2010, http://abcnews.go.com/Health/female-veterans-traumatized-war-fight-battle-va-healthcare/story?id= 9979866.

The "victims" of mental health-related disabilities are not only veterans, but their families, as the VA's motto—"To care for him who shall have borne the battle and for his widow, and his orphan"—has long recognized.[5] Returning veterans' service-related PTSD can substantially impact their relationships with spouses, children, or other loved ones, creating a "secondary traumatization ... within combat veterans' families."[6] The stressors of "combat, long separations, and difficulty readjusting to family life" has caused divorce rates for America's soldiers to rise sharply

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[5] *See* U.S. Dep't of Veterans Affairs, *The Origin of the VA Motto: Lincoln's Second Inaugural Address*, *available at* http://www1.va.gov/opa/publications/celebrate/vamotto.pdf.

[6] Tara Galovski & Judith A. Lyons, *Psychological sequelae of combat violence: A review of the impact of PTSD on the veteran's family and possible interventions*, 9 Aggression and Violent Behavior 477 (Aug. 2004) (Abstract).

since the beginning of the War on Terror. Gregg Zoroya, *Soldiers' Divorce Rates Up Sharply*, USA Today, June 7, 2005. Moreover, researchers have found that veterans diagnosed with PTSD are "'significantly more likely to perpetrate violence toward their partners'" upon return from combat. Lizette Alvarez & Deborah Sontag, *When Strains on Military Families Turn Deadly*, N.Y. Times, Feb. 15, 2008 (quoting 2006 study in the Journal of Marital and Family Therapy).

The readjustment challenges facing veterans and their families are exacerbated when veterans cannot obtain the disability benefits that they are rightfully due upon their return to the United States. One out of every four veterans disabled during the current conflict face an impairment to their earnings capacity of 60% or more, creating intense economic stress to go along with physical or psychological challenges. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment Situation of Veterans Summary*, Mar. 12, 2010, *available at* http://www.bls.gov/news.release/vet.nr0.htm ("Employment Situation of Veterans Summary") (describing number of veterans with disability ratings of 60 or higher). And a veteran's spouse or children may depend on the VA's proper resolution of the veteran's disability claim in order to obtain needed health insurance.[7]

Veterans of the current conflict, and their families, are not alone in relying upon the VA's claims process for assistance. In 2009, over three million veterans

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[7] Dep't of Veterans Affairs Health Administration Center: CHAMPVA, http://www.va.gov/hac/forbeneficiaries/champva/champva.asp (last visited Sept. 14, 2010).

received assistance from the VA, including roughly a million veterans each from the Vietnam War and the Gulf War Eras, as well as approximately 250,000 from World War II, 150,000 from the Korean War, and 600,000 from peacetime. FY 2009 Annual Benefits Report at 5. As illustrated by this case, the VA continues to handle new claims for assistance from veterans of all eras and ages as veterans' disabilities (and their need for assistance) evolve over time.

The lifeline provided by VA assistance has only become more important during the nation's current economic situation. In April 2010, government statistics found that the unemployment rate for veterans of the Iraq and Afghanistan wars reached a staggering 14.7%, over double what it was only in 2007. Laurie Ure, *Unemployment on the Rise for Veterans of Current Wars*, CNN, Apr. 2, 2010, http://news.blogs.cnn.com/2010/04/02/unemployment-on-the-rise-for-veterans-of-current-wars/. Disabled veterans of these current conflicts, and all conflicts, are less likely to be employed than their non-disabled peers. Employment Situation of Veterans Summary. "Mortgage foreclosure rates around military bases [are] four times the average." Ed O'Keefe & Garance Franke-Ruta, *Shinseki cites plight, plan to help homeless veterans*, Nov. 4, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/11/03/AR2009110303615.html (quoting executive director of Iraq and Afghanistan Veterans of America). And often due in part to their disabilities, thousands of veterans of Iraq and Afghanistan are already homeless. *Id.*

B. The Veterans' Disability Claims Process Is Broken And Only Getting Worse

Despite the imperative need for veterans to receive benefits quickly and accurately, the claims process often produces just the opposite results, prompting even the VA to admit that "[t]he current [claims processing] system is broken ... and it can't be fixed." Craig Roberts, *VA: Broken Claims System Can't Be Fixed*, The American Legion, Mar. 22, 2010, *available at* http://www.legion.org/veteransbenefits/9488/va-broken-claims-system-can-t-be-fixed.

Not surprisingly, veterans' disability claims historically have spiked during wartime, and Congress has repeatedly emphasized the importance of timely and fair compensation for disabled veterans returning home from combat. Veterans' benefits expanded greatly with the G.I. Bill of Rights passed after World War II to provide disability, unemployment, education funding, and other benefits to veterans. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284. And not content with the process afforded to veterans whose claims were dismissed by the VA, Congress enacted the Veterans' Judicial Review Act to create the Court of Appeals for Veterans Claims in 1988. *See* Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified in scattered sections of 38 U.S.C.).[8]

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[8] Subsequent congressional enactments have been designed to assist—rather than to impede—veterans navigating a complex disability benefits system. *E.g.*, Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096; Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315; *see Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009) ("Congress has expressed special solicitude for the veterans' cause."). And this Court itself has long recognized the "canon that provisions for

When the Act was passed in 1988, Congress expressed concern that there was "a significant opportunity for some injustices to occur," citing the "tremendous volume of applications for benefits that are processed annually by the VA"—then resulting in almost 40,000 appeals. S. Rep. No. 100-418, at 30. By fiscal year 2008, however, the number of appeals had more than *doubled*, to 88,000.[9] In fiscal year 2008 alone, VA completed 729,000 claims, nearly 66% more than it completed in fiscal year 2000.[10] And by 2009 the VA was receiving more than *one million* claims for disability benefits.[11] These added claims raised the total number of veterans receiving VA disability compensation to 3.16 million as of June 30, 2010.[12] This

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benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (citing *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 285 (1946)).

[9] *See* GAO 09-910T, *Veterans' Disability Benefits, Preliminary Findings on Claims Processing Trends and Improvement Efforts* at 8 (July 2009), *available at* http://www.gao.gov/new.items/d09910t.pdf.

[10] *See* GAO 10-213, *Veterans' Disability Benefits: Further Evaluation of Ongoing Initiatives Could Help Identify Effective Approaches for Improving Claims Processing* 6 (Jan. 2010), *available at* http://www.gao.gov/new.items/d10213.pdf ("GAO 10-213").

[11] *See* U.S. Dep't of Veterans Affairs, *FY 2009 Performance and Accountability Report, Executive Summary* at I-3, *available at* http://www.va.gov/budget/docs/report/FY2009-VAPAR_Executive_Summary.pdf.

[12] *See* Nat'l Center for Veterans Analysis & Statistics, *VA Benefits & Health Care Utilization*, http://www1.va.gov/VETDATA/Pocket-Card/4X6_summer10_sharepoint.pdf (last visited Sept. 14, 2010).

upsurge in claims has only increased the risk that America's servicemen and women will be subject to "injustices" as a result of a system stretched to—and, indeed, beyond—the breaking point.

The VA's disability benefits claim processing system is mired in inefficiency and inaccuracy. Veterans today suffer significant delays in processing their claims. A recent GAO report found that in fiscal year 2008, "VA took on average 776 days to process appeals; 78 days longer than in fiscal year 2004." GAO 10-213, at Highlights. If a veteran seeks review of a denied claim with the Veterans Court, he or she must wait almost a year on average for a decision.[13] Delays and wrongfully denied claims take a substantial toll on veterans, their families, and other dependants, and the problem is getting worse, not better.[14] If a veteran cannot prove his or her claim, the entitlement is gone forever. 38 U.S.C. § 7104(b).

Worse still, a startling number of disability claims are wrongfully denied by the VA. Since 2001, veterans on average have prevailed in whole or in part in roughly 80% of the cases decided by the Veterans

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[13] *See* United States Court of Appeals for Veterans Claims, *Annual Reports*, http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf ("Veterans Court Annual Report").

[14] *See, e.g.*, Lindsay Wise, *VA claims backlog grows at a record pace in Houston: Money, staff fail to stop VA backlog growth*, Houston Chron., Sept. 11, 2010, *available at* http://www.chron.com/disp/story.mpl/metropolitan/7195563.html; Michael B. Farrell, *Wounds of Iraq war: US struggles with surge of returning veterans*, Christian Sci. Monitor, Aug. 16, 2010, *available at* http://www.csmonitor.com/USA/Military/2010/0816/Wounds-of-Iraq-war-US-struggles-with-surge-of-returning-veterans.

Court on the merits. *See* Pet. 14 & n.7. And although "'the government's interest in veterans cases is *not* that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them,'" *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (citation omitted), the government told this Court only months ago that in a shocking 50 to 60 percent of cases before that Court, the government takes a position *against veterans* which is "substantially *unjustified*." Tr. of Oral Argument 52, *Astrue v. Ratcliff*, 130 S. Ct. 2521 (2010) (No. 08-1322) (emphasis added); *see Astrue*, 130 S. Ct. at 2531 n.2; Pet. Br. 27 (veterans challenging administrative denial of disability benefits have been awarded attorney's fees in 50 percent of cases over past two years).

These astonishing statistics underscore the need for appellate review of agency decisions denying disability benefits claims. The decision below nevertheless eliminates the equitable tolling doctrine that has long governed the timeliness of such appeals, including in instances when, as here, the failure to timely file a notice of appeal is attributable to a veteran's combat-related mental illnesses. *See Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004); Pet. App. 4a (deciding case based on premise that "failure to timely appeal was a direct result of [petitioner's] illness"); *id.* at 44a-45a & n.1 (Dyk, J., joined by Gajarsa and Moore, JJ., concurring) (citing additional examples).

The rule adopted by the courts below in this case has had an immediate and profound impact on claims before the Veterans Court, leading to ongoing and regular refusals to consider arguments for equitable tolling. In the first three months of 2010 alone, the Veterans Court has denied 36 appeals for failure to

timely file, notwithstanding the underlying reasons causing delay,[15] and *hundreds* of claims have been dismissed since the Veterans Court first issued its decision in this case. Pet. 15-16. As more soldiers return from the wars in Iraq and Afghanistan and new claims for disability benefits inevitably are filed, the negative impact of the decision below will only increase in its severity. *See* GAO 10-213 at 7-8 (documenting upward trends in claims received, completed, and pending from fiscal years 2000 to 2008).

The loss of even a single meritorious combat-related veterans' disability claim as a result of an erroneous ruling on the time limit for filing an appeal is a tragedy. Disability benefits can make the difference for veterans seeking to re-find their footing in everyday American life, not to mention a difference in the lives of their families as well. Yet the decision below places hundreds if not thousands of such claims at risk.

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[15] Based on its earlier disposition in the present case, the Veterans Court dismissed appeals in the following 2010 cases, as of March 29, 2010: Nos. 09-2493, 08-3698, 09-4011, 09-0567, 06-3170, 09-3495, 09-3091, 09-3465, 09-4255, 09-4094, 07-1923, 09-4149, 09-3851, 08-1468, 07-2008, 09-3242, 09-3216, 09-4030, 09-3832, 09-2241, 09-3076, 09-3787, 09-4743, 09-4308, 09-4508, 09-3566, 09-4627, 09-4690, 09-4261, 09-4663, 09-3758, 08-2910, 09-3253, 09-3199, 08-2984, 09-3710.

II. EQUITABLE TOLLING IS A VITAL SAFEGUARD IN A VETERANS' BENEFITS SYSTEM THAT ALREADY POSES SUBSTANTIAL AND UNWARRANTED BURDENS ON THE NATION'S VETERANS

The veterans benefits statutes and procedures are designed to be "distinctly advantageous to the veteran claimant." *See Bailey v. West*, 160 F.3d 1360, 1363 (Fed. Cir. 1998) (Michel, J., concurring), *overruled on other grounds*, *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009); *see also* Pet. 13 & n.2. The Veterans Court was set in place to provide greater due process protection for disabled veterans. *See, e.g.*, *S. 11, The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act: Hearing Before the S. Comm. on Veterans' Affairs*, 100th Cong. 1 (1988) (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affairs) ("I want to be clear that my motivation in continuing the push for judicial review is the belief that it is a fundamental right which should be afforded to all veterans."). The fact that the VA is prohibited from pursuing review of claim *approvals* favorable to veterans, as well as the court's historically high reversal rate of VA decisions, underscore that this mechanism was designed to serve veterans, not to hinder them. *See* 38 U.S.C. § 7252(a) ("The Secretary may not seek review of any such decision."); Veterans Court Annual Report (documenting the number of merits decisions resulting in reversal and remand).

Yet veterans who enter the VA claims process often feel as though the deck is stacked against them. The disability evaluation process is arduous and often

simply results in uncertainty regarding the status of their benefits, especially as veterans transition from the armed services to the VA. Moreover, veterans face a morass of rules and hurdles governing access to benefits and then review of claims denied by the VA, with bottlenecks at almost every step. *See generally* Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure*, 19 Widener L.J. 57, 97 (2009) ("[T]he VA system itself suffers from a number of built-in, procedural choke points that clog the system and turn it into the equivalent of the Dan Ryan Expressway at rush hour."). Sadly, many a veteran has had to learn first hand that agencies tend to "fall into grooves ... and when they get into grooves, then God save you to get them out." Henry J. Friendly, *Benchmarks* 106 (1967) (quoting *Hearings to Study Senate Concurrent Resolution 21 Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 82d Cong. 224 (1951) (statement of Judge Learned Hand)) (internal quotation marks omitted).

A veteran initiates the process by filing a claim at one of fifty-seven Veterans Affairs Regional Offices ("ROs") located across (and in one case, outside) the country, which take an average time of 196 days to resolve a claim. *See* GAO 10-213 at 2, 9. These regional offices are notorious for being error-prone. Recent inspections by the VA Office of Inspector General to the VA Regional Offices in Baltimore, Anchorage, and

Albuquerque, for instance, uncovered error rates of 38%, 29%, and 36% in claims processed.[16]

Faced with an adverse agency decision on his claim, a veteran may appeal to the Board of Veterans' Appeals ("BVA") within one year of the disability rating decision by filing a notice of disagreement with the RO. *See* 38 U.S.C. § 7105(b)(1). In fiscal year 2008, the BVA took on average 776 days to process appeals. *See* GAO 10-213 at 15. And again—as illustrated by the fact that the BVA's decision has been set aside in a stunning near 80% of cases considered by the Veterans Court, the risk of error is high. If a veteran receives a negative BVA decision, he must file a notice of appeal with the Veterans Court—not the RO or BVA—within 120 days. *See* 38 U.S.C. § 7266(a). The Veterans Court averaged 344 days from filing to disposition in 2009. *See* Veterans Court Annual Report.

Veterans are not trained to navigate the procedural minefields of the VA claims process. And at a time when much attention has been paid to the legal representation received by the *captured combatants* in the ongoing conflicts, it is sobering to learn that most of our veterans are forced to proceed pro se in seeking disability benefits from their own government. Veterans routinely represent themselves pro se before the Veterans Court. In 2009, 68% of the new cases filed in that court were self-represented, and 28% were self-represented at closure. *See* Veterans Court

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[16] *See* VA Office of Inspector General, Inspection of the VA Regional Office, Baltimore, MD, Report No. 09-01993-29 at 2 (Nov. 19, 2009); Anchorage, AK, Report No. 09-01998-42 at 1 (Dec. 7, 2009); Albuquerque, NM, Report No. 10-00935-156 at 2 (May 20, 2010) (all available at http://www.va.gov/oig/publications/reports-list.asp).

Annual Report; *see also Sanders*, 129 S. Ct. at 1707 (taking note that "the veteran is often unrepresented during the claims proceedings"). Removing equitable tolling increases the risk that veterans, particularly those who cannot afford their own counsel, will lose their claims. *See, e.g., Tiller v. Shinseki*, No. 09-3242, 2010 WL 675577, at *1 (Vet. App. Feb. 26, 2010) (denying petitioner's motion for reconsideration even though the veteran "did not have proper counsel" and received faulty advice from his local VA).

The notice of appeal marks the first instance in which veterans are required to interact with the separate and distinct Veterans Court, and the time for appealing often comes after years of pursuing a disability claim through their local VA. All too often veterans mistakenly believe that filing a notice of appeal with their local VA is sufficient, either through their own mistake or even, in some cases, through erroneous advice provided by VA employees. *See, e.g., Tiller*, 2010 WL 675577, at *1; *Green v. Shinseki*, No. 07-1923, 2010 WL 337329, at *2 (Vet. App. Feb. 1, 2010) ("Here, the appellant filed his [notice of appeal] with the RO instead of the Court, and the time to file his [notice of appeal] has long since passed."); *Bove v. Shinseki*, No. 08-1468, 2010 WL 318524, at *2 (Vet. App. Jan. 28, 2010) (dismissing a pro se veteran's claim as untimely even though "[a]t the time the appellant submitted his [notice of appeal] to the RO, he had 54 days before his 120-day appeal period expired").

The VA often exacerbates this problem by holding onto correspondence from veterans intended as notices of appeal to the Veterans Court, but sent to the RO or some other incorrect recipient as a result of the veteran's understandable confusion about the process.

The perception that the VA might even be intentionally "running out the clock," on veterans, *Posey v. Shinseki*, 23 Vet. App. 406, 415 (2010) (Lance, J., concurring), has led Veterans Court Judges to sharply criticize "the inherent unfairness to claimants that is created by VA's actions or lack thereof," question whether VA's actions are "more conscious thought than administrative oversight," *id.* at 412-13 (Hagel, J., concurring), and conclude from "[t]he frequency of the problem ... that there may be confusion in instructions given to veterans." *Id.* at *8 (Lance, J., concurring).

That is just one of the many possible missteps that could cost a veteran his disability benefits for a combat-related injury under the decision below. Yet this problem alone has reached such epidemic proportions that the Veterans Court recently issued an Order directing that where "a self-represented party has misdirected to the Secretary a brief, or any other document required to be filed with the Court, the Secretary will promptly provide the Court with notice, and a copy of" the misdirected document. CAVC Misc. Order No. 03-10, *In Re: Self-Represented Parties' Misdirected Brief and Other Required Documents* (Apr. 2, 2010), *available at* http://www.uscourts.cavc.gov/documents/2010-03_Self_Represented_Parties.pdf. It remains to be seen whether that order will be regularly carried out.

Equally troubling, many veterans seeking benefits are often encumbered by the very combat-related injuries for which they are seeking benefits, particularly where, as in this case, the injuries are mental in nature. As the dissent below observed, the "eradication of equitable tolling in proceedings before

the [Veterans Court] creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them," since "[i]t is the veteran who incurs the most devastating service-connected injury who will often be the least able to comply with rigidly enforced filing deadlines." Pet. App. 46a (Mayer, J., joined by Michel and Newman, JJ., dissenting); *see id.* at 44a (Dyk, J., joined by Gajarsa and Moore, JJ., concurring) (VA claims process can be "extremely difficult ... to navigate," particularly where the veteran "is suffering from a mental disability").

Illustrative are the hundreds of thousands of cases involving veterans with traumatic brain injuries or PTSD. Ten to fifteen percent of those with mild TBI report ongoing cognitive difficulties for years, post injury.[17] Many patients continue to have significant disabilities for years *after* initial inpatient rehabilitation.[18] And the cognitive impairments experienced by veterans with TBI can seriously compromise their ability to navigate the claims process on their own. As the VA has acknowledged, veterans with TBI may experience "[d]ifficulty with executive

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[17] Heather G. Belanger et al., *The Veterans Health Administration System of Care for Mild Traumatic Brain Injury: Costs, Benefits and Controversies*, 24(1) J. Head Trauma Rehabil. 4 (Jan.-Feb. 2009).

[18] VA Office of Inspector General, *Follow-up Health Care Inspection VA's Role in Ensuring Services for Operation Enduring Freedom/Operation Iraqi Freedom Veterans after Traumatic Brain Injury Rehabilitation*, Report No. 08-01023-119 at i (May 1, 2008), *available at* http://www.va.gov/oig/54/reports/VAOIG-08-01023-119.pdf.

functions" such as "speed of information processing, goal setting, planning, organizing, prioritizing, self-monitoring, problem solving, judgment, decision making, spontaneity, and flexibility in changing actions when they are not productive."[19] But of course, these are precisely the capabilities that a layperson would need to navigate the confusing labyrinth that is the claims process.

What is more, a veteran's disability often may worsen during the *years* during which she may wait to receive benefits she should have received up front. It is no wonder then that some veterans have ascribed a new motto to describe the VA's modus operandi: "Delay, Deny, and Hope That I Die." 60 Minutes, *Why the VA Frustrates Veterans: Two Wars Are Slowing the Large Bureaucracy, Delaying Benefits*, CBS News, Jan. 3, 2010, http://www.cbsnews.com/stories/2010/01/01/60minutes/main6045148.shtml.[20]

"Kafkaesque" is an apt description for one recent case in which a veteran's claim was dismissed solely on the basis of the decision below. The veteran promptly submitted paperwork to his local RO after waiting *four*

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[19] Dep't of Veterans Affairs, *Disability Examination Worksheets: Traumatic Brain Injury*, http://www.vba.va.gov/bln/21/benefits/exams/disexm58.htm (reviewed/updated Dec. 15, 2008).

[20] No living generation of veterans—including the Greatest—has been spared this unending procedural nightmare. As one commentator has observed, "[t]he veterans' benefits decisional process ... is only a carousel of remand, mishandling, rehearing, remand, and so on. Many of the longest riders on the carousel are World War II veterans who are dying of old age while they await their benefits." James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 Admin. L. Rev. 223, 229 (2001).

years for a final decision by the BVA denying his disability claim. The RO took the paperwork and told him that the veteran service officer ("VSO") helping him on the case was on vacation, but as the veteran later learned, the VSO had resigned *four months* earlier. Veteran's Response to Court Order Dated January 21, 2010, *Havlik v. Shinseki*, No. 09-4743 (Vet. App. Feb. 18, 2010). When the veteran learned this, he did not know how to proceed because no one had gone over the paperwork with him. The veteran nevertheless filed his notice of appeal, but it arrived at the court three days late. *Havlik v. Shinseki*, No. 09-4743, 2010 WL 890886, at *1 (Vet. App. Mar. 15, 2010). Ordered to show cause why his appeal should not be dismissed, the veteran explained that he had been in and out of the hospital during this period and had recently learned that he had three months to live, that his caregiver too had been ill and required surgery during this period, and that he was misled by his local RO as to how his case was being handled. Veteran's Response to Court Order. In a one page order, the Veterans Court summarily dismissed his appeal as untimely, citing the Federal Circuit's decision in this case. *Havlik*, 2010 WL 890886, at *1.

The equitable tolling doctrine that has been applied by the Veterans Court for two decades provides a critical safeguard to protect veterans in these circumstances and ensure that claims are not lost as a result of excusable neglect or even no fault on the part of the veteran in missing the deadline for an appeal. Equitable tolling is a common-sense and long accepted doctrine. *See Young v. United States*, 535 U.S. 43, 49 (2002) (explaining that it is "hornbook law that limitations periods are 'customarily subject to

"equitable tolling,'" unless tolling would be 'inconsistent with the text of the relevant statute'" (citations omitted)). Thus, as this Court reiterated last Term, "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)).

Nothing in Section 7266(a)—the statute of limitation at issue—explicitly rules out equitable tolling. There is no reason to believe that Congress would enact a veterans' claims process without the protection customarily afforded by the equitable tolling doctrine and put the men and women who have served our nation at risk of losing meritorious disability claims as a result of excusable neglect or even through no fault of their own. And if there were any doubt about whether the nation's elected representatives—many of whom are themselves military veterans—would have intended such an *anti*-veteran scheme, the *pro*-veteran canon of construction that ordinarily governs the statutory claims process, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991), would require giving the benefit of any such doubt to the nation's veterans.

III. THE DECISION BELOW FINDS NO SUPPORT IN THIS COURT'S PRECEDENT

As petitioner has explained, Section 7266(a) is properly read in light of its text, structure, and purpose to incorporate the doctrine of equitable tolling. Pet. Br. 18-32. Moreover, Section 7266(a) is analogous to the statutory deadline in the social security disability context, which this Court held was subject to equitable tolling in *Bowen v. City of New York*, 476 U.S. 467 (1986). *See* Pet. Br. 17-32. Indeed, like the statutory

provision in *Bowen*, Section 7266(a) imposes a time limit on disability plaintiffs for seeking review in a court *for the first time*. And as veterans well know, proceedings before the VA and before the Veterans Court are fundamentally different—with different rules, different players, and different results. Indeed, underscoring the distinct systems, in the past decade, veterans on average have prevailed in roughly 80% of the cases decided by the Veterans Court on the merits. *See supra* at 13. Likewise, as was true for the deadline in *Bowen*, the deadline provision in this case is "contained in a statute that Congress designed to be 'unusually protective' of claimants." 476 U.S. at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)).[21]

The Federal Circuit held—and the government contends—that this case is governed by *Bowles v. Russell*, 551 U.S. 205 (2007), and that equitable tolling is therefore unavailable under Section 7266(a). But *Bowles* cannot bear the weight of that argument. As this Court stressed last Term, *Bowles* did not "hold that all statutory conditions imposing a time limit should be considered jurisdictional," and thus not subject to equitable tolling. *Reed Elsevier*, 130 S. Ct. at 1247. Instead, the Court explained, "*Bowles* stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Id.* at 1247-48. In *Bowles*, this Court

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[21] The fact that the Veterans Court affords deference to findings of fact made during the VA's adjudicatory process does not distinguish this case from a court's review of social security benefits decisions, as described in *Bowen*. *See* 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive ....").

emphasized that it had long held in construing similar statutory provisions to the one at issue in *Bowles* that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" 551 U.S. at 209 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam)). Here, however, there is no comparable backdrop. Rather, as discussed, in the closest precedential analogue (*i.e.*, *Bowen*), this Court held that the statutory deadline was *not* jurisdictional.

Moreover, the statutory deadline in this case, is much closer to the one held *non*-jurisdictional in *Reed Elservier* than the one held jurisdictional in *Bowles*. *Reed Elsevier* concerned whether the Copyright Act's requirement that copyright holders register their works before suing for copyright infringement erects a jurisdictional limit on the federal courts. In answering that question in the negative, the Court held that the Copyright Act merely "imposes a precondition to filing a claim" because it is "not clearly labeled jurisdictional" and "is not located in a jurisdiction-granting provision." 130 S. Ct. at 1247 (citing 17 U.S.C. § 411(a)). The same goes for Section 7266(a). *See* Pet. Br. 18-23.

The statutory deadline at issue in this case also has an element that the provision in *Bowles* and, for that matter, *Reed Elsevier*, lacked: it was passed as part of a statute designed "to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from the VA every benefit and service to which he or she is entitled under law." S. Rep. No. 100-418, at 31. Construing Section 7266(a) as imposing a jurisdictional requirement would fly in the face of that congressional purpose, not to mention this Court's own precedent

holding that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King*, 502 U.S. at 220 n.9. At least without a great deal more, there is no reason to ascribe to Congress the unfathomable intent to deprive the nation's veterans of disability benefits on the basis of a filing deadline missed due to the very disability for which they are seeking benefits, or any other factor that would be excused under the time-honored equitable tolling doctrine.[22]

* * * * *

Few actions say more about our government—and our nation—than the way in which we treat the men and women who have voluntarily placed themselves in harm's way to serve their country and protect and defend the liberty and principles that Americans too

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[22] In *Kirkendall v. Department of Army*, the Federal Circuit held that equitable tolling was available under 5 U.S.C. § 3330a(d), a statutory time limit to file a veterans-preference claim with the Merit Systems Protection Board ("MSPB") under the Veterans Employment Opportunities Act of 1998 ("VEOA"). 479 F.3d 830, 834 (Fed. Cir.) (en banc), *cert. denied*, 552 U.S. 948 (2007). The VEOA provides that "*in no event* may any such appeal be brought ... later than 15 days after the date on which the complainant receives written notification from the Secretary." 5 U.S.C. § 3330a(d) (emphasis added). Yet, in *Kirkendall*, the Federal Circuit concluded that even this "'unusually emphatic'" phrasing did not amount to sufficient evidence of congressional intent to rebut the *Irwin* presumption that equitable tolling is available. 479 F.3d at 839 (quoting *United States v. Brockamp*, 519 U.S. 347, 350 (1997)). Section 7266(a), by contrast, lacks this "in no event" language and merely states that "a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days." 38 U.S.C. § 7266(a). The ordinary rule that Congress intends a statutory deadline to allow for equitable tolling unless it says otherwise therefore plainly governs as to Section 7266(a).

often take for granted. Indeed, many of the troops that are returning from Iraq and Afghanistan with combat-related disabilities today are the men and women who rose to defend the nation in one of its darkest hours—in the wake of the September 11 attacks. The decision below improperly places those veterans—as well as those such as petitioner, who served in prior conflicts—at risk of losing meritorious disability claims through no fault of their own. The Court should reverse that decision and hold that Section 7266(a) is subject to the customary equitable tolling rule.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

DAVID L. HENDERSON,

Petitioner,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the 120-day time limit under 38 U.S.C. § 7266(a) for a veteran to seek judicial review of an agency decision denying service-connected disability benefits restricts the subject-matter jurisdiction of the Veterans Court and therefore cannot be subject to equitable tolling.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE NATURE OF PROCEEDINGS IN THE BOARD IS SUCH THAT THE "APPEAL" TO THE VETERANS COURT IS UTTERLY UNLIKE THE ARTICLE III APPEAL AT ISSUE IN *BOWLES*	5
A. Proceedings In The Board Are Exceptionally Informal.	7
B. Board Decisions Are Plagued By Error And Delay	10
II. MODERN COMBAT INCREASINGLY GIVES RISE TO INJURIES THAT INTERFERE WITH PURSUING DISABILITY CLAIMS, PARTICULARLY AT THE VETERANS COURT	12
A. Service Members Suffer Serious Physical And Mental Injuries That Impair Their Ability To Manage Their Own Affairs	13
B. Most Veterans Appeal To The Veterans Court Without The Assistance Of Counsel	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page

Arbas v. *Nicholson*, 403 F.3d 1379 (Fed. Cir. 2005) 21
Bailey v. *West*, 160 F.3d 1360 (Fed. Cir. 1998), *overruled by Henderson* v. *Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) 20
Barrett v. *Principi*, 363 F.3d 1316 (Fed. Cir. 2004) 21
Bowles v. *Russell*, 551 U.S. 205 (2007) 2, 3
Boyer v. *Derwinski*, 1 Vet. App. 531 (1991) 10
Brannon v. *West*, 12 Vet. App. 32 (1998) 10
Constantino v. *West*, 12 Vet. App. 517 (1999) 9
Jaquay v. *Principi*, 304 F.3d 1276 (Fed. Cir. 2002), *overruled by Henderson* v. *Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) 20
Pierce v. *Underwood*, 487 U.S. 552 (1988) ... 11
Santana-Venegas v. *Principi*, 314 F.3d 1293 (Fed. Cir. 2002) 20
Shinseki v. *Sanders*, 129 S. Ct. 1696 (2009) 3, 22
Talbot v. *Shinseki*, No. 10-1518, 2010 U.S. App. Vet. Claims LEXIS 1554 (Vet. App. Aug. 20, 2010) 20
Walters v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 8, 22
Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982) 6

STATUTES AND REGULATIONS

28 U.S.C. § 2412(d)(1)(A) 11
38 U.S.C. § 1110 6

TABLE OF AUTHORITIES—continued

	Page
38 U.S.C. § 1115	6
§ 5101(a)	6
§ 5103A	9
§ 5902	1, 9
§ 7104(a)	10
§ 7105	6
§ 7107	7
§ 7266(a)	19
38 C.F.R. § 3.103	9, 10
§ 19.29	6
§ 20.201	6
§ 20.700	7, 9
§ 20.702	7
§ 20.703	7
§ 20.710	9
§ 20.1304(c)	10

LEGISLATIVE HISTORTY

Legislative Hearing on H.R. 92, H.R. 315, H.R. 339, H.R. 463, H.R. 538, H.R. 542, H.R. 1426, H.R. 1470, H.R. 1471, H.R. 1527, H.R. 1944, and Discussion Draft of the "Rural Veterans Healthcare Act of 2007" Before the Subcomm. On Health of the H. Comm. On Veterans' Affairs, 110th Cong. (2007) 13

S. Rep. No. 100-418 (1988) 21, 22

H.R. Rep. No. 100-963 (1988) 10

TABLE OF AUTHORITIES—continued

SCHOLARLY AUTHORITY — Page

James Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the Untied States Court of Appeals for Veterans Claims*, 1 Vet. L. Rev. 113 (2009), *available at* http://www.bva.va.gov/docs/VLR_VOL1/vlr1ridgway.pdf 9, 11

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Bd. of Veterans' Appeals, *How Do I Appeal?* (Apr. 2002), *available at* http://www.bva.va.gov/docs/Pamphlets/010202A.pdf 7, 8, 19

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TABLE OF AUTHORITIES—continued

Page

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RAND Ctr. for Military Health Policy Research, *Invisible Wounds of War* (2008) 13, 14, 15, 17, 18

TABLE OF AUTHORITIES—continued

Page

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INTEREST OF THE *AMICUS CURIAE*

The National Veterans Legal Services Program (NVLSP) is an independent nonprofit organization that has worked since 1980 to ensure that the United States government provides our Nation's 25 million veterans and active duty personnel with the federal benefits they have earned through their service to the country.[1] NVLSP has been instrumental in the passage of landmark veterans' rights legislation, and it has successfully challenged unfair practices by the Department of Veterans Affairs (VA) that deprived veterans and their families of hundreds of millions of dollars in benefits. It also serves as a national support center that recruits, trains, and assists thousands of volunteer lawyers and veterans' advocates. NVLSP publications provide veterans, their families, and their advocates with the information necessary to obtain the benefits to which they are entitled under the law. For the last ten years NVLSP has published the *Veterans Benefits Manual*, which has become the leading guide for advocates and attorneys who help veterans and their families obtain benefits from the VA.

In addition, and of particular relevance here, NVLSP is a veterans' service organization recognized by the Secretary under 38 U.S.C. § 5902 to assist veterans in the preparation, presentation and prosecution of claims for benefits before the VA. In this capacity, NVLSP has directly represented hundreds of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief in letters on file with the Clerk's office.

veterans in proceedings before the Board of Veterans' Appeals ("Board"). Given this experience and expertise, NVLSP is well-positioned to describe proceedings that occur in the Board—an understanding of which is critical to recognizing that an "appeal" of Board proceedings to the Court of Appeals for Veterans Claims ("Veterans Court") is quite unlike an appeal in any Article III, jurisdictional sense.

NVLSP submits this *amicus curiae* brief on behalf of petitioner David Henderson because the rule adopted by the Federal Circuit ignores the reality of proceedings in the Board and will lead to gross injustice. If affirmed, the decision below will result in the dismissal of meritorious claims by disabled veterans who are not represented by counsel and who try but fail to obtain timely review in the Veterans Court, including veterans whose disabilities are so severe that they are unable to do so. This result is contrary to the purpose of the VA benefits system—which Congress designed to be pro-veteran, informal and non-adversarial—and the statute authorizing judicial review of final VA decisions, which Congress enacted to ensure that veterans receive the benefits to which they are entitled.

SUMMARY OF ARGUMENT

This brief elaborates on two specific issues that are critical to understanding the error of the decision below.

First, the relationship between proceedings in the Board (the highest level of review within the VA itself) and Article I review in the Veterans Court quite unlike the relationship between the federal district courts and federal courts of appeals that this Court addressed in *Bowles* v. *Russell*, 551 U.S. 205 (2007). *Bowles*, which the Federal Circuit found controlling,

dealt with the move from Article III federal district courts to Article III federal courts of appeals. *Id.* at 206-07. Proceedings in the Board, however, do not remotely resemble litigation in federal district court. Some of this is by design: In recognition of the fact that veterans have "performed an especially important service for the Nation," Congress "has made clear that the VA is not an ordinary agency." *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1707 (2009). Instead of playing the role of adversary or neutral adjudicator, "the VA has a statutory duty to help the veteran develop his or her benefits claims." *Id.* (citing 38 U.S.C. § 5103A). Therefore, proceedings in the VA Regional Offices (RO) and at the Board are informal and "not truly adversarial," and "the veteran is often unrepresented" by counsel.

Moreover, proceedings within the VA are qualitatively different from those in federal district court. Whether because of the informality of proceedings in the RO and the Board, or because the VA is not doing its job adequately, the Board often reaches the wrong result. Unlike the federal courts of appeals, where reversal rates are low, the Veterans Court reversed or vacated Board decisions in 81% of the cases it reviewed on the merits in fiscal year 2009. Indeed, the performance of the Board is so deficient that attorneys' fees were awarded in 73% of Veterans Court appeals. This simply confirms what is clear from the statutory structure: When a veteran files a so-called "notice of appeal" in the Veterans Court, this initiates court proceedings and litigation for the first time. It is initial review of agency decisionmaking—with a reversal rate to match—and it is altogether unlike the "notice of appeal" that an appellant files in a United States court of appeals.

Second, before this Court blesses a rule that equitable tolling is *never* permissible in this context—the undisputed result of the decision below—it should understand the practical consequence of that decision. Numerous veterans incur disabling injuries during their military service, and these numbers have risen sharply as hundreds of thousands of soldiers have served repeated and extended tours of combat duty in Iraq and Afghanistan. According to the VA itself, 35% of veterans who served in Iraq and Afghanistan have filed claims for disability benefits.[2]

Many of these veterans have suffered injuries that interfere with cognitive ability and decisionmaking — precisely the faculties that are necessary for litigation decisions, especially when, as often is the case, the veterans proceed *pro se*. These veterans commonly suffer from the "signature wounds" of the Iraq and Afghanistan conflicts—traumatic brain injury and post-traumatic stress disorder (PTSD).[3] Such injuries typically interfere with attention, concentration, new learning, and memory. As a result, veterans with such disabilities often find it difficult to manage the activities of daily life, such as scheduling and keeping appointments—much less to understand the multitude of procedures and regulations that govern the VA's benefits process in general, or appeal requirements in particular. To adopt a rule that equit-

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[2] Gov't Accountability Office, GAO 10-213, *Veterans' Disability Benefits: Further Evaluation of Ongoing Initiatives Could Help Identify Effective Approaches for Improving Claims Processing* 11 (Jan. 2010), *available at* http://www.gao.gov/new.items/d10213.pdf [hereinafter "*GAO Report*"].

[3] *See* Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010), http://www.whitehouse.gov/the-press-office/2010/08/31/remarks president-address-nation-end-combat-operations-iraq.

able tolling is jurisdictionally unavailable to such veterans is to guarantee that numerous meritorious claims will be denied.

ARGUMENT

I. THE NATURE OF PROCEEDINGS IN THE BOARD IS SUCH THAT THE "APPEAL" TO THE VETERANS COURT IS UTTERLY UNLIKE THE ARTICLE III APPEAL AT ISSUE IN *BOWLES*.

The decision below, in which the Federal Circuit held that the time for filing a "notice of appeal" in the Veterans Court is jurisdictional, was expressly "based on *Bowles*." Pet. App. 2a. It noted, for instance, repeating the government's arguments about *Bowles*, that "§ 7266(a) refers to the filing in the Veterans Court as a 'notice of appeal,' indicating that the Veterans Court does not commence litigation, *but rather continues litigation first brought before the Board*." *Id.* at 24a (emphasis added). The suggestion that what occurs before the Board is "litigation" represents a fundamental misapprehension of that administrative process.

This is not only because "the Veterans Court is the first opportunity for a veteran to appear before a judicial body," Pet. App. 26a, or even because of the "uniquely pro-claimant, non-adversarial nature of the veterans system," *id.* at 41a. More fundamentally, it is because proceedings in the Board bear none of the hallmarks of "litigation" in any traditional sense. "[P]roceedings before the board are fundamentally unlike proceedings before a district court." *Id.* at 54a (Mayer, J., dissenting). Those agency proceedings are non-adversarial and exceptionally informal. They are characterized by gross delay and inaccuracy. And, perhaps not unrelatedly, veterans typically proceed

in the Board without counsel. As this Court has recognized, it is "particularly inappropriate" to treat a deadline as jurisdictional "in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (internal quotations omitted).

Under these circumstances, the analogy between the "notice of appeal" that a veteran files to commence litigation in the Veterans Court, and the traditional appellate proceedings at issue in *Bowles*, does not withstand scrutiny. Rather, "[i]n the veterans' adjudicatory system," it is the "appeal from the Veterans Court to [the Federal Circuit]" that "is the procedural equivalent of an appeal from a district court to a court of appeals." Pet. App. 51a (Mayer, J., dissenting).

Before turning to the specifics of proceedings in the Board, it is worthwhile briefly to explain the process by which veterans file and pursue claims before reaching the Board. See also Pet. Br. 4-6. The United States provides disability compensation to veterans with injuries or diseases incurred or aggravated during active military service, 38 U.S.C. § 1110, as well as to certain qualifying dependants, *id.* § 1115. To obtain compensation, a veteran must initially file an application at a VA Regional Office. *Id.* § 5101(a). If the RO denies the claim in whole or in part, the veteran may file a "notice of disagreement" within one year. *Id.* § 7105(a) & (b)(1); 38 C.F.R. § 20.201. The RO may reconsider its original decision, but if it does not, it provides a "statement of the case" identifying the evidence, laws, and regulations on which the regional office relied. 38 U.S.C. § 7105(d)(1); 38 C.F.R. § 19.29. Upon receipt of the RO's statement of the case, the veteran may then make a "substantive appeal" to the Board of Veterans' Appeals. 38 U.S.C.

§ 7105(a). It is at that point that proceedings in the Board commence.

A. Proceedings In The Board Are Exceptionally Informal.

"When it established the Veterans Court, Congress made clear that proceedings before that court were not to be overly 'formalized,' but instead were to be '[a]ccurate, informal, efficient and fair.'" Pet. App. 68a (Mayer, J., dissenting) (alteration in original) (quoting H.R. Rep. No. 100-963, at 26 (1988)). Whatever success the *Veterans Court* may have had in achieving these goals, the Board has achieved only informality.

In the Board, proceedings are conducted by a Board member, see 38 U.S.C. § 7107(c), now referred to as a "Veterans Law Judge," see NVLSP, *Veterans Benefits Manual* § 13.1.2 & n.10 (2009). If the veteran elects, his or her claim proceeds by way of a "hearing," 38 U.S.C. § 7107(b), either in Washington, D.C. or at the VA Regional Office where the claim was filed.[4] This is not a "hearing," however, in any traditional adjudicatory sense. As the VA candidly admits in its instructional pamphlet, "Personal hearings with a Board Member are informal. They are not like the courtroom hearings you see on TV or in trials." *How Do I Appeal?*, at 9. Confirming that this hearing is unlike "hearings you see on TV" or litigation in any

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[4] 38 U.S.C. § 7107(d); 38 C.F.R. §§ 20.702, 20.703; *see also* Bd. of Veterans' Appeals, *How Do I Appeal?*, at 8 (Apr. 2002), *available at* http://www.bva.va.gov/docs/Pamphlets/010202A.pdf. A hearing at the Regional Office can be a "Travel Board" hearing, in which a Veterans Law Judge travels to the RO to hear appeals, or a videoconference. *See* 38 C.F.R. §§ 20.700(e), 20.703; *Veterans Benefits Manual* § 13.2; *How Do I Appeal?*, at 8.

traditional sense, the VA depicts these "hearings" as follows:

Personal hearing with Board Member

Id. A Veterans Law Judge typically devotes one hour to each hearing, see *Veterans Benefits Manual* §§ 13.3.3.1, 13.6.2.1, and may hold as many as 10 hearings per day, see *How Do I Appeal?*, at 10. It is unlikely that these "judges" could devote any more time to such hearings if they wished: During the last fiscal year, the 60 Veterans Law Judges conducted 11,629 hearings and issued 48,804 decisions.[5]

Simply put, the VA does not follow "the adversary mode of dispute resolution utilized by courts in this country," *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Instead, Board hearings are "informal and nonadversarial." *Id.* at 324, 325. Hearings are ex parte—the Secretary does not

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[5] *See* Bd. of Veterans' Appeals, *Report of the Chairman: Fiscal Year 2009*, at 3 (Mar. 2010), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf [hereinafter "*FY 2009 Report of the Chairman*"].

appear to oppose the claimant. 38 C.F.R. § 20.700(c). Indeed, it is only recently that veterans are permitted to be represented by paid counsel at these hearings, *id.* § 3.103(e), and the reality is that most veterans appear *pro se*. When they are represented, it typically is by a veterans' service organization such as NVLSP, which are prohibited from charging any fee for their services. 38 U.S.C. § 5902(b)(1)(A). In fiscal year 2009, fewer than 8% of veterans had attorneys at the Board, and approximately 10% appeared *pro se*.[6]

At the hearing, the rules of evidence do not apply. 38 C.F.R. § 20.700(c). Although the veteran and any other witnesses are under oath, *id.* § 20.710, cross-examination is not allowed, *id.* § 20.700(c). Indeed, the hearing proceeds unlike "litigation" in the traditional sense, *but cf.* Pet. App. 24a, as the proceedings are meant to be cooperative rather than adversarial. For instance, the Board has a duty to help the veteran develop a claim that was not properly developed at the RO. *See Constantino* v. *West*, 12 Vet. App. 517, 520 (1999); 38 U.S.C. § 5103A (Board must ensure that the veteran receives assistance in obtaining medical examination and records pertaining to military service or medical treatment).

Finally, unlike traditional modes of adjudication, strict rules of error-preservation and waiver do not apply. Rather, the Board "is required to adjudicate all issues reasonably raised by a liberal reading of the appellant's substantive appeal, including all docu-

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[6] *See FY 2009 Report of the Chairman* at 21; *see also* James Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 Vet. L. Rev. 113, 133 & n.101 (2009), *available at* http://www.bva.va.gov/docs/VLR_VOL1/vlr1ridgway.pdf (citing statistics from FY 2005 and 2006).

ments and oral testimony of the record prior to the Board's decision." *Brannon* v. *West*, 12 Vet. App. 32, 34 (1998); see also 38 C.F.R. § 3.103(a). The Board reviews the decision of the regional office de novo, *Boyer* v. *Derwinski*, 1 Vet. App. 531, 533 (1991), and renders a decision that "shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation," 38 U.S.C. § 7104(a). In so doing, the veteran may elect to have the Board consider new evidence that was not presented to the RO. 38 C.F.R. § 20.1304(c).

B. Board Decisions Are Plagued By Error And Delay.

Although Board proceedings are "informal," they are not "accurate" or "efficient." H.R. Rep. No. 100-963, at 26 (1988). Notwithstanding the non-adversarial nature of the agency process and the Board's duties to assist, the Board does not achieve the results that one associates with, for instance, federal district court litigation. In fiscal year 2009, the veteran prevailed in approximately 80% of the cases in which the Veterans Court reviewed a Board decision on the merits.[7] Indeed, although the Veterans Court is the first point at which proceedings are adversarial and the Secretary is represented by counsel, remarkably the Secretary felt compelled to consent to vacatur and remand in fully 54% of cases. In an additional 27% of cases (i.e., more than half of the cases in which the Secretary even defended the Board), the

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[7] U.S. Court of Appeals for Veterans Claims, Annual Reports 2000-2009, *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf [hereinafter *"Veterans Court Annual Reports"*].

Veterans Court reversed or remanded the Board's decision in whole or in part.[8] In short, the Board was affirmed in only 17% of the cases that the Veterans Court reviewed on the merits. *Veterans Court Annual Reports*.

Even more striking, the Board's decisions are sufficiently mistaken that the Veterans Court awards attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A), most of the time. In fiscal year 2009, the Veterans Court awarded fees in 2385 cases, while denying them in only 21. See *Veterans Court Annual Reports*. Such fees may be awarded only when "the position of the United States" was not "substantially justified," 28 U.S.C. § 2412(d)(1)(A)—i.e., merely "justified to a degree that could satisfy a reasonable person." *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988). Yet that meager threshold rarely is met.

The Board's inaccuracy is compounded by delay. Most veterans must wait several years before receiving a final decision from the Board. According to the Board's most recent statistics, it takes an average of 1060 days from the time a veteran files a notice of disagreement with the regional office until the Board issues a decision. These delays are only likely to increase. The Board faced a large backlog of cases at the end of fiscal year 2009, and predicts that an even larger number of cases will be added to its docket in fiscal years 2010 and 2011. *FY2009 Report of the*

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[8] Of the 3270 cases decided by the Veterans Court in fiscal year 2009, 1758 were "Remanded" to the Board, 496 were "Affirmed or dismissed in part, reversed/vacated & remanded in part," and 397 were "Reversed/vacated & remanded." *Veterans Court Annual Reports*. The "Remands" are "cases in which the parties agreed to that remedy through a joint motion granted by the court." Ridgway, *supra*, at 152 & n.226.

Chairman, at 18, 22. This is due at least in part to the increasing number of claims being filed by aging veterans and veterans returning from the wars in Iraq and Afghanistan. Approximately 35% of Iraq and Afghanistan veterans file claims for disability compensation. See *GAO Report* at 11. The VA is also "receiving more claims for complex disabilities related to combat and deployments overseas, including those based on environmental and infectious disease risks and traumatic brain injuries." *Id.* at 12.

In short, the cohort of cases that make their way to the Veterans Court are not characterized by the sort of finality—or accuracy—that one would anticipate at the outset of an "appeal." Instead, these decisions are in the main erroneous, often admittedly so, and the proceedings in the Veterans Court more closely resemble litigation in the first instance to correct agency error. Pet. Br. 27-28 & n.4.

II. MODERN COMBAT INCREASINGLY GIVES RISE TO INJURIES THAT INTERFERE WITH PURSUING DISABILITY CLAIMS, PARTICULARLY AT THE VETERANS COURT.

Even if the Board functioned as one might hope and expect, the practical reality is that the inflexible rule adopted by the Federal Circuit will lead directly and inevitably to the denial of meritorious claims. This is because modern combat in particular inflicts injuries that are clinically recognized to cause functional impairments that can interfere with a disabled veteran's ability to meet rigid deadlines. See Pet. App. 46a (Mayer, J., dissenting) ("It is the veteran who incurs the most devastating service-connected injury who will often be the least able to comply with rigidly enforced filing deadlines."). This is particularly true of the wars in Iraq and Afghanistan, both because the

nature of the combat in these wars gives rise to such injuries, and because advances in battlefield medicine have increased survival rates for such injuries. Atul Gawande, *Casualties of War: Military Care for the Wounded from Iraq and Afghanistan*, 351 New Eng. J. of Med. 2471, 2471 (Dec. 2004). These disabilities are particularly likely to cause problems at the moment when a veteran seeks to transition from proceedings in the Board to review in the Veterans Court. It is at this juncture that the process becomes formal and adversarial for the first time. Particularly in light of the high error rate in Board decisions, there is no question that if the decision below is affirmed, numerous meritorious claims will be rejected on technical procedural grounds.

A. Service Members Suffer Serious Physical And Mental Injuries That Impair Their Ability To Manage Their Own Affairs.

It is widely recognized that many of the most common combat injuries can cause significant, long-term cognitive impairments. The ongoing wars in Afghanistan and Iraq have highlighted the prevalence of two such injuries—traumatic brain injury and post-traumatic stress disorder (PTSD). While neither injury is new, these have been called the "signature wounds" of the current wars because of the frequency with which American soldiers have been targeted by roadside bombs, improvised explosive devices (IEDs), and human suicide bombers. See RAND Ctr. for Military Health Policy Research, *Invisible Wounds of War* 3, 5 (2008); *Remarks by the President*, *supra* n.3; *Legislative Hearing on H.R. 92, H.R. 315, H.R. 339, H.R. 463, H.R. 538, H.R. 542, H.R. 1426, H.R. 1470, H.R. 1471, H.R. 1527, H.R. 1944, and Discussion Draft of the "Rural Veterans Healthcare Act of 2007" Before the Subcomm. On Health of the H. Comm. on*

Veterans' Affairs, 110th Cong. 21, 74 (2007) (Rep. Altmire). Traumatic brain injuries and post-traumatic stress disorder both can impair a veteran's ability to manage his own affairs, and even to function in society. These are precisely the sort of claimants who should be eligible for equitable tolling in appropriate cases.

1. *Traumatic Brain Injury.* A recent study by the RAND Center for Military Health Policy Research indicates that approximately 19% of soldiers deployed to Iraq or Afghanistan likely suffered a traumatic brain injury during their deployment. RAND, *supra*, at 105. Veterans with moderate or severe traumatic brain injuries frequently experience difficulty with attention, concentration, new learning, memory, and executive control functions. Veterans Health Initiative, *Traumatic Brain Injury* 73-74 (Jan. 2004). Problems with learning and memory, which are the most commonly reported deficits, cause veterans to have "difficulty performing [the] complex activities of daily living." *Id.* at 74. These veterans may suffer from an impaired ability to engage in reasoning and problem solving. *Id.* They may experience difficulty with task persistence, planning and organization, foresight and anticipation. *Id.* In addition, these injuries may make it hard "to schedule and keep appointments." RAND, *supra*, at 318. Even with treatment, these injured veterans often face a lengthy road to recovery, with the majority unable to regain their full cognitive abilities. Veterans Health Initiative, *supra*, at 15.

In addition, veterans with only mild brain injuries also may experience difficulty with concentration, memory, and decision-making, including forgetfulness or confusion regarding recent information and events. *Id.* at 23-29. Approximately 10-30% of individuals with mild traumatic brain injury suffer "sig-

nificant long-term residual neurological symptoms." *Id.* at 29.

2. *Post-Traumatic Stress Disorder.* Similar impairments characterize PTSD, which is particularly prevalent in veterans returning from Iraq and Afghanistan. RAND recently found that nearly 14% percent of service members who were deployed to Iraq or Afghanistan during the recent wars currently suffer from PTSD. RAND, *supra*, at 97 tbl.4.4 & 103. PTSD is a "signature wound" of the Iraq and Afghanistan wars, but the disorder certainly is not new to America's veterans. Studies of Vietnam-era veterans show that 20-30% have suffered from war-related PTSD, with 10-15% still suffering from the disorder 15 years or more after service. Kristine Yaffe et al., *Posttraumatic Stress Disorder and Risk of Dementia Among U.S. Veterans*, 67 Arch. Gen. Psychiatry 608, 608 & nn.2, 3 (2010). A 1994 study of veterans from World War II and the Korean War similarly found that approximately 12% still experienced symptoms of PTSD decades after the wars. *Id.* at 608 & n.4 (citing Spiro et al., *Combat-related Posttraumatic Stress Disorder Symptoms in Older Men*, 9 Psychol. Aging 17 (1994)).

Veterans with PTSD often are significantly impaired in their ability to concentrate and carry out daily tasks.[9] It long has been recognized that veterans suffering from PTSD (as well as similar cognitive and emotional disorders), may find it difficult to navigate administrative systems with unfamiliar rules and regulations. See RAND, *supra*, at 314 (the De-

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[9] See Nat'l Inst. for Mental Health, *Post-Traumatic Stress Disorder (PTSD)* 2, *available at* http://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/nimh_ptsd_booklet.pdf.

partment of Defense and VA health systems "may be particularly challenging, given that the servicemembers may be cognitively or emotionally impaired and their families may have a limited understanding of these systems"). This is especially true where the veteran's injury directly impairs his or her ability to learn and remember new information, plan, organize, conceptualize, and perform other process-related functions. Accordingly, a veteran suffering from any such disorder often has difficulty pursing a claim for benefits with the VA, especially if, like Mr. Henderson, he or she is proceeding *pro se*.

Moreover, these veterans often face increased difficulty in pursing a claim for benefits with the VA as they age and their mental functioning decreases. Veterans with PTSD are nearly twice as likely to develop dementia later in life. Yaffe, *supra*, at 610. Of course, dementia is not limited to veterans with PTSD: One study found that 7.3% of all veterans in the VA medical system suffer from some form of dementia. Laura Krishnan et al., *Prevalence of Dementia Among Veterans Affairs Medical Care System Users*, 20 Dement. Geriatr. Cogn. Disord. 245, 245 (2005). In addition to the well-recognized issue of memory loss, "[p]eople with dementia .... lose their ability to solve problems and maintain emotional control, and they may experience personality changes and behavioral problems such as agitation, delusions, and hallucinations."[10]

3. *The Compounding Effect of Multiple Injuries.* The degree of impairment experienced by veterans suffering from traumatic brain injury or PTSD is

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[10] Nat'l Inst. of Neurological Disorders & Stroke, Dementia: Hope Through Research (May 21, 2010), http://www.ninds.nih.gov/disorders/dementias/detail_dementia.htm.

compounded when, as often is the case, these conditions are accompanied by other injuries. Mild traumatic brain injury, for instance, is significantly associated with post-traumatic stress disorder, which often leads to a compounding of symptoms. The lack of sleep commonly resulting from PTSD can "significantly affect" symptoms of traumatic brain injury, such as memory problems. RAND, *supra*, at 309.

Veterans often contend with other mental health issues as well. About two-thirds of previously deployed military personnel who suffer from PTSD also have major depression, see *id.* at 103, which in turn tends to exacerbate the symptoms of PTSD, see *id.* at 125. Accordingly, such individuals tend to have "more-severe depression, lower social support, more suicide ideation, and more-frequent primary care and mental health care visits." *Id.* at 125-26.

These already-debilitating conditions are further complicated by the frequent lack of adequate treatment. Whether due to a missed diagnosis or avoidance based on stigma, "nearly 60 percent of persons who experienced a probable brain injury during deployment [in Iraq and Afghanistan] have not been evaluated for this condition by a physician or other health specialist." *Id.* at 108. Nearly 70% of those needing mental health care have not received minimally adequate treatment, and almost 50% have not received any care. *Id.* at 103 tbl.4.8. As a result, symptoms from these conditions frequently persist longer and with greater severity. And while these sorts of cognitive and mental wounds are difficult enough to manage on their own, they are often accompanied by other serious physical injuries. The IED or other blast explosions that cause head injury also inflict severe damage to the rest of the soldier's body, especially to extremities unprotected by body

armor. Severe limb trauma, sometimes resulting in amputation, occurs all too frequently.

It is not surprising, therefore, that high proportions of service members with severe limb trauma also contend with associated cognitive and mental wounds. Studies consistently show that those who have been wounded in combat face significantly higher rates of PTSD. *Id.* at 54. For example, a third of service members with combat-related limb loss have a related traumatic brain injury, and a quarter suffer from PTSD. Paul F. Pasquina, *DOD Paradigm Shift in Care of Service Members with Major Limb Loss*, 47 J. Rehab. Research & Dev. (Apr. 20, 2010), *available at* 2010 WLNR 15008013, at *2.

In short, veterans continue to bear the emotional and physical brunt of our Nation's wars, and they do so in ways that directly affect their ability to pursue the benefits to which those injuries entitle them. As we discuss next, these cognitive disabilities are likely to cause particular difficulty at the moment when, under the Federal Circuit's holding below, no equitable relief is available—the transition from the Board to the Veterans Court.

B. Most Veterans Appeal To The Veterans Court Without The Assistance Of Counsel.

Upon the Board's denial of a claim for benefits, a veteran immediately faces an array of options. He or she may

(1) file a motion to reconsider, or a claim for revision of the Board decision based on "clear and unmistakable error";

(2) return to the Regional Office to file a reopened claim;

(3) seek review of the Board's decision by the Veterans Court; or

(4) do nothing and abandon the claim for benefits.

See *Veterans Benefits Manual* §§ 14.2, .4, .6; *How Do I Appeal?*, at 12. This strategic judgment of how to proceed is complicated enough by itself, and even more so if the veteran decides to seek review by the Veterans Court. Such review is the moment of transition from the pro-veteran, informal, non-adversarial VA administrative system to the formal, adversarial judicial system of the Veterans Court. Veterans typically must make this transition without an attorney. As discussed above, *supra* at 9, most veterans appear before the Board *pro se* or with the assistance of a veterans' service organization. But many such organizations do not litigate in the Veterans Court, see *Veterans Benefits Manual*, ch. 14, n.1, so most veterans are forced to initiate the appeal on their own. In fiscal year 2009, 68% of the veterans to file an appeal with the Veterans Court were "self-represented at filing." *Veterans Court Annual Reports*.

Unrepresented by counsel, veterans predictably make procedural missteps. For instance, whereas the initial claim for benefits and the "notice of disagreement" are filed in the VA's Regional Office, see *supra* at 6, the "notice of appeal" to the Veterans Court must be filed in that court. 38 U.S.C. § 7266(a).[11] It has been commonplace for veterans (even when assisted by service organizations) to file in the wrong venue—i.e., in the RO with which they have been

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[11] This fact by itself further highlights that the "notice of appeal" is the commencement of judicial proceedings, and is more akin to filing a complaint than to an appeal in the Article III sense addressed in *Bowles*. *See* Pet. Br. 19-20, 42.

dealing, instead of in the Veterans Court. Prior to the decision below, equitable tolling was applied to cases like these,[12] which is all the more appropriate given the extent to which the VA itself has exacerbated such errors, see Pet. Br. 27-28. That avenue for relief now is closed. *E.g.*, *Talbot* v. *Shinseki*, No. 10-1518, 2010 U.S. App. Vet. Claims LEXIS 1554, at *1 (Vet. App. Aug. 20, 2010) (case dismissed where notice of appeal "inadvertently sent ... to the VA regional office") (unpublished). The results are predictably unjust, as Judge Dyk acknowledged even while concurring in the decision below:

> [T]he rigid deadline of the existing statute can and does lead to unfairness. This is particularly so in the many cases where the veteran is not represented by counsel during the processing of the claim at the Veterans Administration and/or is suffering from a mental disability. These circumstances can make it extremely difficult for the veteran to navigate the system and meet the statutory deadline.

Pet. App. 44a.

The potential for mistake and delay is compounded when the veteran has a severe physical or mental

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[12] *See, e.g.*, *Santana Venegas* v. *Principi*, 314 F.3d 1293, 1295-98 (Fed. Cir. 2002) (veterans service organization mistakenly sent notice of appeal to the regional office); *Bailey* v. *West*, 160 F.3d 1360, 1361, 1365-68 (Fed. Cir. 1998) (en banc) (equitable tolling applied where VA regional office employee told a *pro se* veteran she would file his appeal with the CAVC but the form was mistakenly placed in the veteran's file at the regional office); *cf. Jaquay* v. *Principi*, 304 F.3d 1276, 1279, 1286 (Fed. Cir. 2002) (en banc) (equitable tolling applied where veterans service organization misfiled a motion for reconsideration by the Board that would have tolled the 120-day period for appealing to the CAVC).

disability (and all the more so when he or she remains hospitalized or incapacitated because of wounds suffered in battle). Although the Federal Circuit carefully policed the boundaries of equitable tolling, it properly recognized that there are certain veterans—including those suffering from the types of injuries described above, and like Mr. Henderson—who suffered disabling mental injuries that were incurred in or aggravated by their military service. Under the Federal Circuit's prior precedents, therefore, the 120-day filing deadline was equitably tolled in cases, like this one, in which the claimant's disability rendered him "incapable of rational thought or deliberate decision making" or "incapable of handling [his] own affairs or unable to function [in] society." *Barrett* v. *Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004) (quotations omitted) (alteration in original); see also, *e.g.*, *Arbas* v. *Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005).

To treat the filing deadline as jurisdictional, and thereby to exclude such veterans from the Veterans Court, is directly contrary to Congress's purpose in authorizing judicial review of Board decisions. Until Congress established the Veterans Court, a veteran whose claim for benefits was wrongly denied by the Board had no recourse. Congress determined, however, that to "continue to inform claimants before the VA that benefits to which they are entitled by law could be wrongly denied and that there is no remedy for such a wrongful denial, is no longer a viable position." S. Rep. No. 100-418, at 50 (1988). Congress therefore enacted the Veterans' Judicial Review Act to provide "fundamental justice," *id.*, and to "ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from the VA every benefit and service to

which he or she is entitled under law," *id.* at 31. There is nothing "compassionate" or "fair" or "efficient" about denying review to veterans whose service-related injuries are so severe that they cannot handle their own affairs. Congress consistently "has expressed special solicitude for the veterans' cause," see *Sanders*, 129 S. Ct. at 1707, and has since the earliest days of the Nation "'provided for him who has borne the battle, and his widow and his orphan,'" *Nat'l Ass'n of Radiation Survivors*, 473 U.S. at 309. It could not and did not intend the inequitable result of the decision below.

CONCLUSION

For the reasons set forth above, and in the Brief for Petitioner, the decision below should be reversed.

Respectfully submitted,

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September 17, 2010

AMICUS CURIAE BRIEF

No. 09-1036

In the
Supreme Court of the United States

DAVID L. HENDERSON,
Petitioner,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICI CURIAE* PARALYZED VETERANS OF AMERICA AND AARP IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO SETTLED LAW AND HARMS DISABLED VETERANS 4

A. Who are the veteran claimants affected by this decision? 7

B. Did Congress intend that this group be unknowingly deprived of appeal rights? 16

C. Congress intended that veterans jurisdictional statutes be liberally construed to allow equitable tolling 21

II. THE FEDERAL CIRCUIT'S DECISION REWARDS VA FOR THWARTING VETERANS' ATTEMPTS TO APPEAL 23

III. THE ANALYSIS IN *REED ELSEVIER, INC. V. MUCHNICK* ALSO POINTS TO THE RESULT THAT 38 U.S.C. § 7266 IS NOT JURISDICTIONAL 26

IV. CONGRESS CREATED THE COURT OF APPEALS FOR VETERANS CLAIMS TO PROVIDE JUDICIAL REVIEW TO VETERANS, NOT DENY IT, AND DID NOT MAKE 38 U.S.C. § 7266 STRICTLY JURISDICTIONAL 34

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Arbas v. Nicholson,
403 F.3d 1379 (Fed. Cir. 2005) 5, 21

Arbaugh v. Y & H Corporation,
546 U.S. 500 (2006) 27, 30

Bailey v. West,
160 F.3d 1360 (Fed. Cir. 1998) (*en banc*) ..... *passim*

Barrett v. Principi,
363 F.3d 1316 (Fed. Cir. 2004) 5, 21, 22, 37

Bethea v. Derwinski,
2 Vet.App. 252 (1992) 35

Block v. Comm'r of Internal Revenue,
2 T.C. 761 (1943) 33

Bowen v. City of New York,
476 U.S. 467 (1986) 36

Bowles v. Russell,
551 U.S. 205 (2007) ..... *passim*

Bragdon v. Abbott,
524 U.S. 624 (1998) 23

Brandenburg v. Principi,
371 F.3d 1362 (Fed. Cir. 2004) 24

Brown v. Gardner,
513 U.S. 115 (1994) 17

Coffy v. Republic Steel Corp.,
447 U.S. 191 (1980) 17, 21

Eberhart v. United States,
546 U.S. 12 (2005) 31

Fishgold v. Sullivan Drydock & Repair Corp.,
328 U.S. 275 (1946) 17

Harris v. Shinseki,
2010 WL 668926 (Feb. 26, 2010) 24

Henderson v. Shinseki,
589 F.3d 1201 (Fed. Cir. 2009) (*en banc*) ..... *passim*

Hoffenberg v. Comm'r of Internal Revenue,
905 F.2d 665 (2d Cir. 1990) 33

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) ..... *passim*

Irwin v. Shinseki,
23 Vet. App. 128 (2009) 23, 25, 36

Jaquay v. Principi,
304 F.3d 1276 (Fed. Cir. 2002) (*en banc*) 5

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 5

Kontrick v. Ryan,
540 U.S. 443, 455 (2004) 30

Lorillard v. Pons,
434 U.S. 575 (1978) 23

Menominee Indian Tribe of Wisc. v. United States,
___ F.3d ___, 2010 WL 2977225
(D.C. Cir. July 30, 2010) 31

McKnight v. Gober,
131 F.3d 1483 (Fed. Cir. 1997) 17

McNutt v. GMAC,
298 U.S. 178 (1936)) 35

Posey v. Shinseki,
23 Vet.App. 406 (2010) 26, 36

Reed Elsevier, Inc. v. Muchnick,
130 S.Ct. 1237 (2010) ..... *passim*

Rickett v. Shinseki,
23 Vet.App. 366 (2010) 24, 25, 26, 35

Santana-Venegas v. Principi,
314 F.3d 1293 (Fed. Cir. 2002) 5, 25

Santoro v. Principi,
274 F.3d 1366 (Fed. Cir. 2001) 25

Scarborough v. Pargoud,
108 U.S. 567 (1883) 31

Stambush v. Shinseki,
2010 WL 318493 (Jan. 28, 2010) 24

Stebbins' Estate v. Helvering,
121 F.2d 892 (D.C. Cir. 1941) 33

Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. Of Adjustment, Central Region,
130 S.Ct. 584 (2009) 34, 35

United States v. Brockamp,
519 U.S. 347 (1997) 23

United States v. Byrd,
53 M.J. 35 (C.A.A.R. 2000) 33

United States v. Curry,
6 How. 106 (1848) 31

United States v. Ponds
1 C.M.A. 385 (1952) 33

United States v. Rodriguez,
67 M.J. 110 (C.A.A.F. 2009) 33

United States v. Tamez,
63 M.J. 201 (C.A.A.F. 2006) 33

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385, 393 (1982) 27, 30

STATUTES

10 U.S.C. § 867 (2006) 31

10 U.S.C. § 867(b) 32

26 U.S.C. § 6213 (2006) 31

26 U.S.C. § 6213(a) 32

28 U.S.C. § 1491 (2006) 32

28 U.S.C. § 1581 (2006) 32

38 U.S.C. §§ 170101-170111 (2006) 1

38 U.S.C. § 1705 (2006) 17, 19

38 U.S.C. § 1710 (2006) 19

38 U.S.C. §§ 7101-7105 (2006) 6

38 U.S.C. § 7252 (2006) 29, 30, 31

38 U.S.C. § 7266 (2006) ..... *passim*

41 U.S.C. § 601 (2006) 32

Veterans Benefits Improvement Act of 1994,
Pub. L. No. 103-446, 108 Stat. 4670
(Nov. 2, 1994) 22

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Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4116 (Nov. 18, 1988) 16

REGULATIONS

38 C.F.R. § 3.350 (2009) 7

38 C.F.R. § 4.1 (2009) 7

38 C.F.R. § 4.16 (2009) 7

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Department of Defense Numbers for Traumatic Brain Injury, http://www.health.mil/Research/TBI-Numbers.aspx 15

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INTEREST OF *AMICI CURIAE*[1]

Paralyzed Veterans of America and AARP join to file this amicus brief in support of Mr. Henderson. Paralyzed Veterans of America is a non-profit veterans service organization founded in 1946 and chartered by the Congress of the United States. *See* 36 U.S.C. §§ 170101-170111 (2006). The organization has more than 15,000 members, each is a veteran of the Armed Forces of the United States who suffers from an injury or disease of the spinal cord. Paralyzed Veterans of America's statutory purposes include acquainting the public with the needs and problems of paraplegics; promoting medical research in the several fields connected with injuries and diseases of the spinal cord; and advocating and fostering complete and effective reconditioning programs for paraplegics. *Id.*

Paralyzed Veterans of America carries out its statutory purposes by operating various beneficial programs, such as providing free representation before the Department of Veterans Affairs (VA or agency) to its members and other veterans, dependents, and survivors who have filed claims with the agency seeking benefits authorized by Congress.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for the parties received timely notice of the intent to file this brief, and letters reflecting the consent of the parties have been filed with the Clerk.

Paralyzed Veterans of America also provides free legal services to members and other veterans, dependents, and survivors seeking judicial review of agency benefit decisions.

AARP is a national nonpartisan, nonprofit organization that helps people fifty and older maintain independence, choice and control in ways that are beneficial and affordable to them and to society as a whole. In representing the interests of its members, and to promote social welfare, AARP seeks to enhance the quality of life and to promote independence, dignity, and purpose for individuals as they grow older. Assuring that older people receive the government benefits they are entitled to is a top priority for AARP. There are approximately 17,000,000 veterans age 50 and older in the United States. *See* Veteran Population 2007, DEP'T OF VETERANS AFFAIRS, *available at* http://www1.va.gov/VETDATA/Demographics/Demographics.asp. Over half of the veterans with service-related disabilities are older than 55. *See id.* at 41. In 2000, of the veterans with service-related disabilities, Vietnam War veterans comprised the largest group, followed by peacetime veterans, World War II veterans, Gulf War veterans, and veterans of the Korean War. *See id.* Since many veterans rely upon their monthly veterans benefits to meet their basic needs, and their needs frequently change as they grow older, AARP is deeply concerned that older veterans like Mr. Henderson receive the veterans benefits to which they are entitled.

Because the United States Court of Appeals for the Federal Circuit's decision in *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (*en banc*), results in the denial of judicial review of agency benefit decisions that affect the members of each organization, Paralyzed Veterans of America and AARP have a strong interest in seeking to have this Court reverse the *Henderson* decision.

SUMMARY OF ARGUMENT

The Federal Circuit's decision is inconsistent with Congress's intent, harms veterans, and should not stand. Petitioner Mr. Henderson and the dissent in the Federal Circuit's *en banc* decision have eloquently explained the legal errors in the decision below. *Henderson*, 589 F.3d at 1221-33; this Court's recent decision in *Reed Elsevier* further illustrates the error in the Federal Circuit's analysis. *See Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237 (2010). Amici write to support Mr. Henderson and to further argue that Congress did not and could not have intended the interpretation of 38 U.S.C. § 7266 (2006) adopted by the Federal Circuit or the consequences that result from the interpretation.

These consequences may be dire for certain veterans. Many veterans with severe disabilities, such as the members of Paralyzed Veterans of America, are prevented by those disabilities from participating in the normal activities of daily life for long periods of time. A disabled veteran may be hospitalized and rehabilitating for well more than 120 days, without regular access to mail, and may

unknowingly lose appeal rights as a result. When appeal rights are lost, so are any chances of the earliest possible effective date for the assignment of benefits – benefits that include medical care that may be essential to the veteran.

The Federal Circuit's decision has already had the effect of rewarding VA for thwarting veterans' attempts to appeal. Using *Henderson*, the Court of Appeals for Veterans Claims has dismissed appeals where VA held or misdirected a veteran's appeal-related correspondence, causing the veteran to lose his appeal rights. Under prior case law, the veteran's misdirected pleading could be construed as timely filed, but now the veteran has no recourse in this situation except to start the VA's lengthy claims process anew. Congress did not intend this result when making judicial review available to veterans.

Paralyzed Veterans of America and AARP believe that *Henderson* harms their members and all veterans and ask that this Court reverse the Federal Circuit's decision.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO SETTLED LAW AND HARMS DISABLED VETERANS.

The Federal Circuit departed from settled law when it decided *Henderson*, relying on *Bowles v. Russell*, 551 U.S. 205 (2007), rather than *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96

(1990), to determine that 38 U.S.C § 7266 is a jurisdictional "time of review" provision and that, therefore, equitable tolling is not available to veterans seeking judicial review of VA decisions. *Henderson*, 589 F.3d at 1220. The court erred in presuming that *Bowles* somehow undermined or diminished *Irwin*. *Henderson*, 589 F.3d at 1212-13. This is simply not the case. *Irwin* was, and still is, the relevant precedent. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008) ("Courts do not normally overturn a long line of earlier cases without mentioning the matter," referring to *Irwin*); *Bowles*, 127 S.Ct. at 2369 (Souter dissenting); *see also Reed Elsevier*, 130 S.Ct. at 1245, 1247-48.

Prior to *Henderson*, and based upon *Irwin*, the Federal Circuit had developed significant jurisprudence on the applicability of equitable tolling to veterans' claims. *See, e.g.*, *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (*en banc*); *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (*en banc*) (veteran misfiled reconsideration); *Santana-Venegas v. Principi*, 314 F.3d 1293 (Fed. Cir. 2002) (veteran misfiled at VA Regional Office); *Barrett v. Principi*, 363 F.3d 1316 (Fed. Cir. 2004) (mental illness may have prevented timely filing); *Arbas v. Nicholson*, 403 F.3d 1379 (Fed. Cir. 2005) (heart condition may have prevented timely filing). These cases fell roughly into two categories, one in which a veteran attempted to protect his rights by filing some indication of an intent to appeal but fell short or was impeded by his litigation adversary, and another in which the veteran's disability prevented him from

even protecting his rights. These distinctions were based in part on this Court's decision in *Irwin*, in which this Court stated that equitable tolling is available (1) "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period," or (2) "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. This rubric permitted the necessary flexibility both for veterans to have their errors assessed fairly and for the Court of Appeals for Veterans Claims to protect its jurisdiction on a case-by-case basis. 38 U.S.C. § 7266.

With *Henderson*, the Federal Circuit has replaced flexibility with a rigid, unyielding rule. This inflexibility has caused actual harm to disabled veterans claiming benefits. These veterans, who may have either misfiled a notice of appeal with the VA or the agency's Board of Veterans' Appeals (Board)[2] or filed the notice late because of their disability, as Mr. Henderson did, had no idea that their minor errors would have significant, fatal consequences to their claims. This Court should reverse *Henderson* and restore the prior line of cases.

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[2] The Board is a subpart of the VA responsible for handling appeals of benefits claims within the agency. *See, e.g.*, 38 U.S.C. §§ 7101-7105 (2006). The Board is a nonadversarial forum, but the time for appeal to the Court of Appeals for Veterans Claims begins to run upon issuance of the Board's decision. 38 U.S.C. § 7266 (2006).

A. Who are the veteran claimants affected by this decision?

For the insidious effect of *Henderson* to be understood, the nature of the population seeking VA benefits must be understood as well. Currently, VA serves more than 23 million veterans. 2010 Organizational Briefing Book (June 2010) DEP'T OF VETERANS AFFAIRS, at 2, *available at* http://www4.va.gov/ofcadmin/docs/vaorgbb.pdf. The median age is 61; more than 9 million veterans are over 65 years old. *Id.*

More than 3 million veterans receive disability compensation, and of those, nearly 290,000 are rated 100 percent disabled.[3] VA Stats at a Glance, DEP'T OF VETERANS AFFAIRS, updated July 30, 2010, http://www1.va.gov/VETDATA/Pocket-Card/4X6_summer10_sharepoint.pdf. An additional 270,402 receive "individual unemployability" benefits, which are paid at the 100 percent rate. *Id.* Under 38 C.F.R. § 4.16 (2009), a veteran may be eligible for these benefits if his or her service-

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[3] VA ratings are made in increments of 10 and expressed in percentages ranging from 0 to 100; they represent the average impairment of earning capacity. 38 C.F.R. § 4.1 (2009). While "special monthly compensation" may increase a veteran's benefits payment, *see* 38 C.F.R. § 3.350 (2009), for most veterans 100 percent is the highest rating. A 100 percent rating can be assigned for a single disability, for example paraplegia, 38 C.F.R. § 4.71a (2009), severe mental disorders, 38 C.F.R. § 4.130 (2009), or anatomical loss of both eyes, 38 C.F.R. § 4.79 (2009). A 100 percent rating can also be reached through a combination of disabilities. 38 C.F.R. § 4.25 (2009).

connected disabilities do not combine to 100 percent yet those disabilities render the veteran unable to maintain employment. Thus, at the moment, more than half a million severely disabled veterans receive compensation at the 100 percent rate, and VA has noted that, while the average disability rating was 41 percent in 2009, the percentages of veterans in the two highest disability levels were growing at the fastest rates. Strategic Plan FY 2010-2014, DEP'T OF VETERANS AFFAIRS, at 13, June 2010, *available at* http://www1.va.gov/op3/Docs/StrategicPlanning/VA_2010_2014_Strategic_Plan.pdf (hereinafter "VA Strategic Plan").

This VA Strategic Plan recognizes that increased disability levels, the changing nature of the disabilities veterans are experiencing, and an aging veteran population presents challenges:

> Disability compensation has changed in recent years as the nature of combat related wounds and service connected injuries has changed. Many of the disabilities that are increasing most rapidly in the Veteran population are those that are difficult to rate, such as PTSD. For example, new linkages to Agent Orange – specifically, prostate cancer discovered in 1996 and Type II diabetes discovered in 2001 – have contributed to the upward trend of disability ratings. . . .

The aging of America's citizens will affect VA. . . . Overall, the number of aging Veterans who may need extended care is growing rapidly: the number of enrolled Veterans 85 or older is projected to increase 32 percent from 601,202 to 792,498 between 2009 and 2018. This group accounts for the highest usage of long-term care services. Though not all aging Veterans will require our care, the growth in this population is highly likely to increase the demand for the extended and specialized services the elderly require. . . .

In addition to changes in the Veteran population, Veterans and VA face an uncertain external environment. For example, Veterans face unique challenges as part of their reentry into the workforce. Economic conditions are having a significant negative impact on Veterans and a disproportionate impact on recently-separated Veterans compared to the average American. Veterans continue to suffer disproportionately high homeless rates compared to the general population. On any given night in 2008, an estimated 131,000 Veterans were homeless, representing every war and generation including current OEF/OIF

> [Operation Enduring Freedom/ Operation Iraqi Freedom] operations

Id. at 12-14. Thus, VA is well aware that veterans are increasingly relying more and more upon the agency.

Paralyzed veterans are likely to have a complex disability profile and they rely heavily – and uniquely – on VA for help. The VA assists between 9,000 and 15,000 veterans with spinal cord injuries, disease and disorders ("SCI/D") on a yearly basis. *See* Sherri Lavela et al., *Disease Prevalence and Use of Preventative Services: Comparison of Female Veterans in General and Those with Spinal Cord Injuries and Disorders*, 15 J. WOMEN'S HEALTH 301, 302 (2006). This makes the VA the largest single provider of care for individuals with spinal cord injury in the United States. *See id.*

Individuals with spinal cord injury or disease are disproportionately affected by chronic health conditions and other serious illnesses. *See id.* In a study conducted on secondary conditions in veterans with SCI/D, the researchers found that "serious . . . secondary conditions are common" and take an important toll on people living with SCI/D." Geoffrey M. Prysak, *Prevalence of Secondary Conditions in Veterans with Spinal Cord Injury and Their Interference with Life Activities*, TOPICS IN SPINAL CORD INJURY REHAB., Summer 2000, at 39. Of all the participants in this study, 37.4% had arthritis or rheumatism, 30.8% had hypertension,

26.4% had lung/respiratory problems and 23.1% had a hearing impairment. *See id.* at 38.

What is most striking about this study is that the researchers demonstrated that these secondary conditions significantly interfere with the daily living activities of veterans with spinal cord injury. *See id.* at 39. Of the participants in the study:

- 74.7% reported that they needed help to get across a small room;
- 49.5% reported that they needed help to enter and exit their homes;
- 45.1% reported that they needed help to bathe;
- 38.5% reported that they needed help to dress;
- 19.8% reported that they needed help to eat; and
- 16.5% reported that they needed help with personal grooming.

See id. at 38. The study also revealed the "troubling" prevalence of psychological symptoms among the participants. *See id.* at 40. All of these limitations affect a person's ability to conduct personal business and meet deadlines.

In another study, "reports of the mean number of physical health and mental health days that were 'not good' were nearly double among women with SCI/D over women in general." Lavela *supra* at 395. In addition, in a study where over half of the participants were veterans with SCI/D, researchers found that "the experience of a life-

threatening trauma such as a spinal cord injury may cause fears about death to surface" and that "death anxiety predicts a significant amount of the total levels of posttraumatic stress reactions." Erin Martz, *Death Anxiety as a Predictor of Posttraumatic Stress Levels Among Individuals with Spinal Cord Injuries*, 28 DEATH STUDIES 1, 14-15 (2004). In fact, yet another study indicated that those veterans with paraplegia are at a substantial risk for PTSD since the study determined that 25% of the participants met criteria for current PTSD and 47% met criteria for lifetime PTSD. *See* Cynthia I. Radnitz, *Posttraumatic Stress Disorder in Veterans with Spinal Cord Injury: Trauma-related Risk Factors*, 11 J. TRAUMATIC STRESS 505, 517 (1998). And "[d]epression is found two or three times more often among people who are paralyzed than among the nondisabled." Depression, CHRISTOPHER AND DANA REEVE FOUND., http://www.christopherreeve.org/site/c.mtKZKqMVWKwGIb/501527/k.1FD9/Depression.htm#. These studies and statistics demonstrate that spinal cord injury and the common complications among paralyzed veterans could easily interfere with a veteran's ability to comply with a strict statutory deadline.

Likewise, studies have shown that older veterans are especially susceptible to certain health issues, making it more difficult to comply with a strict filing deadline. Depression, in particular, is an enormous problem for elderly veterans. *See* Leonard E. Egede & Ralph H. Johnson, Telepsychology Service Delivery for Depressed Elderly Veterans, http://www.hsrd.research.va.gov/resources/abstracts.c

fm?Project_ID=2141696588. A recent study of nearly 300,000 veterans age 55 and older revealed that older veterans with depression were twice as likely to develop dementia compared to those without depression. *See* Amy L. Byers, *The Impact of Dysthymia and Depression on Risk of Dementia and Mortality Among Older Veterans*, 6 ALZHEIMER'S & DEMENTIA S464 (2010). The most prevalent service-connected condition among older veterans in 2009 was defective hearing, *see* Veterans Benefits Administration Annual Benefits Report Fiscal Year 2009, DEP'T OF VETERANS AFFAIRS, at 17, May 2010, *available at* http://www.vba.va.gov/REPORTS/abr/2009_abr.pdf, and research indicates that there is a significant correlation between defective hearing and depression. *See* Francisco Panza et al., *The Relationship Between Hearing Impairment and Depression in Older Veterans*, 54 J. AM. GERIATRICS SOC'Y 1475, 1476 (2006).

Additionally, the reactivation of PTSD among older veterans including World War II, Korean War, and Vietnam era veterans has become frighteningly more frequent. One study found that 15% of Vietnam veterans currently have PTSD. *See* Roger J. Sherwood et al., *The Aging Veteran: Re-Emergence of Trauma Issues*, 40 J. GERONTOLOGICAL SOC. WORK 73, 75 (2003). According to Dr. Roger Sherwood and other researchers:

> [A]s [veterans] begin to experience the changes and losses associated with aging, traumatic memories and delayed stress reactions are not uncommon.

> The aging process itself brings with it a multitude of physiological, psychological and social adjustments. Aging may be considered a risk factor for previously traumatized individuals [citation omitted]. Late onset PTSD may be triggered by developmental tasks of later life while existing PTSD symptoms may be exacerbated by the aging process. . . . The veteran with PTSD may find that a current loss triggers intrusive thoughts from the past and with it the experience of unresolved feelings. It is not uncommon to see a previously functional individual become symptomatic following real and perceived losses such as retirement, moving, debilitating illness in self or spouse or death of a loved one.

Id. at 77-78. Another study revealed preliminary evidence of a phenomenon similar to (though distinct in many ways) late-onset PTSD – late-onset stress symptomatology ("LOSS") – among older veterans. *See* Eve H. Davison, *Late-Life Emergence of Early-Life Trauma*, 28 RESEARCH ON AGING 84, 108 (2006). LOSS is

> a phenomenon among older veterans who (a) were exposed to highly stressful combat conditions in their early adult years, (b) have functioned successfully over the course of their lives, with no

> histories of chronic stress-related disorders, but (c) begin to register increased combat-related thoughts, feelings, reminiscences, memories, or symptoms commensurate with changes of the aging process 30, 40, or even 50 years after their combat experiences.

Id. at 87. Approximately 85% of veterans in the study "reported increased thoughts and memories of their time in the war" while many of the veterans "described having sudden, unwanted, and intrusive memories related to their wartime experiences." *Id.* at 97.

It is worth taking special note of PTSD and traumatic brain injury (TBI), two disabilities that affect veterans in disproportionate numbers and can have an effect on a veteran's cognitive abilities. 38 C.F.R. §§ 4.124a, 4.130 (2009). Nearly 400,000 veterans receive disability compensation for PTSD. VA Stats at a Glance. Numbers on compensation for TBI are harder to come by, as it is often associated with other injuries. 38 C.F.R. § 4.124a, but the Department of Defense reports just under 179,000 diagnoses of TBI among members of all the military branches since 2000. Department of Defense Numbers for Traumatic Brain Injury, http://www.health.mil/Research/TBI-Numbers.aspx. Veterans with these cognitive impairments may have difficulty understanding and meeting statutory filing deadlines.

Finally, the newest veterans are filing claims in high numbers, but with difficulty. VA has stated that "of the 1.1 million OEF/OIF Veterans released from service between 2001 and 2009, more than 37 percent, or approximately 405,000, have filed for disability benefits. Of those almost 50 percent have filed with incomplete information." VA Strategic Plan at 16. Claims such as these often end up in the appeals process.

Thus millions of veterans utilize the VA claims process, and hundreds of thousands of these veterans have severe physical and mental disabilities that affect their ability to prosecute their claims and protect their rights. These are the people that Congress intended to provide for in creating judicial review of agency decisions. Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4116 (Nov. 18, 1988) (VJRA). These are the people who are also adversely affected by *Henderson*.

B. Did Congress intend that this group be unknowingly deprived of appeal rights?

The answer must be no. It is inconceivable that Congress would create a system in which disabled veterans could seek redress against VA when their benefit claims are denied, and then punish those same veterans for being disabled and unable to protect their rights.

It is well known that the VA has a backlog of cases and that a veteran may wait years for a decision on his claim. It is also well known that the VA claims system is ex parte and nonadversarial. This Court has long recognized that the character of the veteran's benefits statutory scheme is strongly and uniquely pro-claimant. *See, e.g., Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (veterans statutes must be liberally construed for the benefit of the returning veteran (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)); *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (noting that, where statute is ambiguous, "interpretive doubt is to be resolved in the veteran's favor" (citing *Brown v. Gardner*, 513 U.S. 115, 118, (1994))). Because this nonadversarial system imposes no time requirements upon the VA or Board in which to render a decision, the veteran cannot control when the 120-day appeal period in § 7266(a) may begin to run. A veteran could file a "substantive appeal," the last step he is responsible for in the agency process when appealing to the Board, 38 U.S.C. § 7105(b)(2); 38 C.F.R. § 20.202 (2009), and a year or two later a Board decision may simply appear in his mailbox one day. This aspect of the "nonadversarial" VA system cannot be emphasized enough: there are no time limits on VA, at any point in the process. A veteran has no way to know when his appeal period will begin to run.

This unpredictability can result in a heavy burden on veterans with severe disabilities such as those described in the previous section, who may not understand the significance of this seemingly

random piece of mail. Additionally, for veterans whose conditions and complications from those conditions may require lengthy hospitalization and rehabilitation, a jurisdiction-preserving action may be required of them when they are in no position to give it thoughtful attention.

For paralyzed veterans, this is not a theoretical possibility, it is a fact of daily life. Homer S. Townsend, executive director of Paralyzed Veterans of America, is a long-time member and a seasoned, sophisticated executive. On January 25, 2010, he was hospitalized for a pressure ulcer.[4] Surgery was required, there were complications, and he has been hospitalized four times for weeks at a time or under home care since January; he expects to be released from medical oversight in September 2010. Telephone Interview with Homer S. Townsend, Executive Dir., Paralyzed Veterans of America in D.C. (Sept. 8, 2010). Even though Mr. Townsend has had assistance to keep up with personal and business affairs, he said that deadlines and payments could be easily missed, especially during hospital stays. *Id.*

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[4] Pressure ulcers are one of the most common health risks for paralyzed people and can turn into life-threatening infections; surgical care of a pressure ulcer may require "lengthy hospitalization." Pressure Ulcer Treatment, NW REG'L SPINAL CORD INJURY SYS., *http://sci.washington.edu/info/newsletters/articles/05fall_pressureulcers.asp*; *see also* Medical Services Program, PARALYZED VETERANS OF AMERICA, *http://www.pva.org/site/PageServer?pagename=benefits_medical_commoncomplications*.

Even though he did not have a VA claim pending this time, "I know how to advocate for myself," Mr. Townsend, a former service officer, said. "But for veterans who don't," there can be missed deadlines or misunderstandings about what they are required to do in the VA process. Additionally, he noted that medical issues can arise suddenly for veterans with serious disabilities. "A [Paralyzed Veterans] member can go in for his annual check up, and if the doctor finds something that's a concern, the veteran can end up in the hospital for two or three months, far from home," he said.

Veterans end up "far from home" because, while the VA has more than 900 clinics and facilities nationwide, *see* 2010 Organizational Briefing Book at 1, the agency has only 21 "SCI Centers" that specialize in treating veterans with spinal cord injury and disease. *See* SCI Centers, DEP'T OF VETERANS AFFAIRS, *http://www.sci.va.gov/sci_centers.asp*. SCI centers may treat all eligible SCI veterans. 38 U.S.C. § 1705(a)(4) (2006); 38 U.S.C. § 1710 (2006). A disabled veteran such as a Paralyzed Veterans of America member who requires extensive hospitalization and surgical intervention may find himself tens or hundreds of miles from home, even at the nearest SCI Center. It is not difficult to imagine that a person's daily business, such as answering the mail, might be disrupted in this situation.

That is precisely what happened to another long-time Paralyzed Veterans member and executive. Like Mr. Townsend, Richard L. Glotfelty has recently experienced a lengthy hospital stay

because of complications from his spinal cord injury. Telephone interview with Richard L. Glotfelty, Vice Pres., Paralyzed Veterans of America in D.C. (Sept. 9, 2010). Mr. Glotfelty had a cardiac condition that required surgical intervention. While most people might have been released from the hospital in a week or two, Mr. Glotfelty's SCI condition required that he be in an SCI Center about 100 miles from his home for nearly four months. Even though he is a sophisticated patient, he found that keeping on top of personal and business matters from the hospital was difficult, and even though he had help at home, certain payments were missed in his absence.

Mr. Townsend and Mr. Glotfelty are capable professionals who, even with assistance, found it a challenge to manage their personal affairs while being treated away from home. Most disabled veterans are not in the same position. Under the Federal Circuit's decision, a paralyzed veteran seeking VA benefits may well lose his appeal rights if he is receiving treatment for his disability at the same time the Board just happens to issue a decision in his case. He may be nowhere near his mailbox when the Board decision arrives, much less be in any position to appreciate the jurisdictional significance of the postmark on that envelope.

There is no evidence in 38 U.S.C. § 7266, or in any of chapter 72 for that matter, that Congress intended such a result. The Federal Circuit erred in imposing this burden, and the Court should reverse.

C. Congress intended that veterans jurisdictional statutes be liberally construed to allow equitable tolling.

In *Barrett*, the Federal Circuit noted, "It would be both ironic and inhumane to rigidly implement section 7266(a) because the condition preventing a veteran from timely filing is often the same illness for which compensation is sought." *Barrett*, 363 F.3d at 1320; *see Arbas*, 403 F.3d at 1381[5]; *see also Coffy v. Republic Steel*, 447 U.S. at 196 (statutes benefiting veterans should be liberally construed). In *Henderson*, however, the Federal Circuit has essentially found that Congress did

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[5] In *Arbas*, the Federal Circuit considered the effects of physical disabilities:

> There are a myriad of physical illnesses or conditions that impair cognitive function or the ability to communicate. Solely by way of example, while a stroke victim does not suffer from a mental illness, it would be manifestly unjust to refuse tolling if the stroke were sufficiently incapacitating. The same could be true of one who has suffered severe head trauma or a heart attack. In other cases, one may retain full consciousness but still be unable to speak or communicate effectively, as may be the case for those in extreme pain or who have been immobilized. These examples are not intended as an exhaustive list of conditions that warrant tolling.

Arbas, 403 F.3d at 1381.

intend to treat veterans in an ironic, inhumane manner through rigidly interpreting § 7266. *See Henderson*, 589 F.3d at 1220-21 (concurring judges agreeing that the "rigid deadline of the existing statute can and does lead to unfairness.") There is no evidence, however, that Congress intended the result reached in *Henderson*.

As discussed *supra* the Federal Circuit carefully crafted a line of cases, beginning with *Bailey*, 160 F.3d 1360, that led to *Barrett* and *Arbas*. Since this Court's decision in *Irwin* and the Federal Circuit's decision in *Bailey*, Congress has taken no action that would indicate dissatisfaction with equitable tolling being available to veterans. In fact, § 7266(a) remains largely unchanged since *Bailey*. The predecessor statute was passed as part of the VJRA. *Irwin* was decided in 1990. Congress amended the statute in 1994. Veterans Benefits Improvement Act of 1994, Pub. L. No. 103-446, 108 Stat. 4670 (Nov. 2, 1994). *Bailey* was decided on November 8, 1998, and Congress amended 38 U.S.C. § 7266 on November 11, 1998. Veterans Programs Enhancements Act of 1998, Pub. L. No. 105-368, 111 Stat. 3315 (Nov. 11, 1998). Congress last amended § 7266 in 2001, repealing a provision that had required a veteran to serve a notice of appeal on the VA. Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 (Dec. 27, 2001).

When Congress amended § 7266(a) in 1994, it is presumed to have done so with full knowledge of *Irwin's* settled holding that equitable tolling is

available in suits against the federal government. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well"); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). When Congress again amended the section in November 1998 and December 2001, it is presumed to have been fully aware of both *Irwin* and *Bailey*. Yet, no change was made that would indicate Congress wanted to restrict the results of *Bailey* or otherwise limit the availability of equitable tolling to veterans, and the only reasonable conclusion is that Congress authorized the use of equitable tolling under § 7266(a). *Compare Bailey*, 160 F.3d at 1365, *with United States v. Brockamp*, 519 U.S. 347, 350 (1997) (*Irwin* presumption can be rebutted if there is a "good reason" to believe Congress did not want equitable tolling to apply.)

II. THE FEDERAL CIRCUIT'S DECISION REWARDS VA FOR THWARTING VETERANS' ATTEMPTS TO APPEAL.

For veterans who may have misdirected their appeal-related filings to VA instead of the Court of Appeals for Veterans Claims, *Henderson* has already produced harsh results. An unhappy byproduct of the case has been decisions such as *Irwin v. Shinseki*, 23 Vet. App. 128 (2009). In *Irwin v. Shinseki*, the veteran mailed his notice of appeal one week after the Board decision, but misdirected the

notice to the Board, rather than to the court. The Board ultimately forwarded it to the court more than four months later, past the 120-day appeal period. Based on *Bowles* and *Henderson*, the Court of Appeals for Veterans Claims dismissed, finding the attempt to file insufficient and the Board's inaction irrelevant. *Irwin*, 23 Vet App at 131. Since *Irwin v. Shinseki* was decided, the court has issued at least 30 similar decisions according to a Westlaw search.[6] Overall, the Court of Appeals for Veterans Claims has dismissed more than 330 appeals based on *Henderson* and *Irwin*.

Cases such as *Rickett v. Shinseki*, 23 Vet App 366 (2010) (appeal docketed May 27, 2010 at 2010-7093) are particularly noteworthy. In *Rickett*, the veteran attempted to file his notice of appeal but

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[6] Most of these decisions are single judge memoranda, simply applying *Henderson* and *Irwin v. Shinseki*. *See, e.g., Harris v. Shinseki*, 2010 WL 668926 (Feb. 26, 2010). In some instances, the judges struggle with the fact that VA inaction was fatal to the veteran's claim but then dismiss nonetheless. *See Stamburski v. Shinseki*, 2010 WL 318493 (Jan. 28, 2010) (Judge Moorman):

> The Court notes the failure of the Board to determine that the appellant's August 2008 document that, in the first line of the correspondence, stated that the appellant wished to appeal the [B]oard decision was a misdirected NOA, and the Board mailed the correspondence to the RO rather than to this Court. The Court takes no pleasure in granting the Secretary's motion to dismiss under such circumstances. Unfortunately, without congressional authority, the Court lacks the jurisdiction to impose a remedy in this appeal.)

mistakenly mailed it to VA's Office of General Counsel. At the time, the veteran had roughly 50 days remaining in his appeal period. One might expect VA's attorneys to recognize the significance of a notice of appeal, but no one in the VA Office of General Counsel acted upon Mr. Bickett's notice for several weeks, and then it was to forward it to the VA Regional Office in Waco, Texas. *Id.* The appeal period expired before the veteran knew about his error. The Court of Appeals for Veterans Claims dismissed, stating "This matter is firmly controlled by *Irwin* and *Henderson*." *Id.* at 368.

The problem presented in cases like *Irwin v. Shinseki* is not new; the Federal Circuit has dealt with many cases with similar facts. *See, e.g., Brandenburg v. Principi*, 371 F.3d 1362 (Fed. Cir. 2004) (misfiled at Board); *Santana-Venegas v. Principi*, 314 F.3d 1293 (Fed. Cir. 2002) (misfiled at Regional Office); *Santoro v. Principi*, 274 F.3d 1365 (Fed. Cir. 2001) (misaddressed appeal); *see also Henderson*, 589 F.3d at 1220-21 (concurrence noting that difficulties in navigating the system "are not merely hypothetical."). In each case, a veteran misdirected a filing intended for the Court of Appeals for Veterans Claims to the VA, and in each case the VA either lost or held the jurisdictionally significant document until it was too late for the veteran to appeal. Under the Federal Circuit's prior case law, however, these cases could be dealt with and a fair result obtained. *See Henderson*, 589 F.3d at 1208 (discussing prior cases).

What is new and what *Pocket* makes so clear is that under the sweeping interpretation of *Henderson* now VA may act (or fail to act) with impunity, no matter whether its actions are intentional or accidental. *See Posey v. Shinseki*, 23 Vet.App. 406, 409-11 (2010) (describing and questioning VA's mail handling procedures). There is no penalty on VA, and no mechanism for a veteran to regain the lost opportunity to appeal.

Congress did not intend this result, and the Court should take this opportunity to correct the Federal Circuit's interpretation.

III. THE ANALYSIS IN *REED ELSEVIER, INC. V. MUCHNICK* ALSO POINTS TO THE RESULT THAT 38 U.S.C. § 7266 IS NOT JURISDICTIONAL.

The Federal Circuit reached the incorrect result in *Henderson* because it chose the path of *Bowles* rather than *Irwin*. Recent guidance from this Court provides additional support for finding that the Federal Circuit, in effect, made a wrong turn. This Court recently clarified that its decision in *Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory exceptions to or limits on a time limit should be considered jurisdictional. *Reed Elsevier*, 130 S.Ct. at 1247.

The Court counseled that the correct approach is to utilize the analysis set forth in *Arbaugh v. Y & H Corporation*, 546 U.S. 500, 515-16 (2006) and first determine whether Congress has clearly stated that " 'a threshold limitation on a statute's scope shall count as jurisdictional.' " *Reed Elsevier* at 1244 (quoting *Arbaugh*, 546 U.S. at 515-16). If Congress has not made a clear statement, then the Court "must focus on the 'legal character' of the requirement . . . by looking into the condition's text, context, and relevant historical treatment." *Id.* at 1246 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)).

Applying this analysis here, the starting point is the statutory language in Chapter 72: United States Court of Appeals for Veterans Claims, Subchapter II: Procedure, Section 7266: Notice of Appeal –

> (a) In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.
>
> (b) An appellant shall file a notice of appeal under this section by

delivering or mailing notice to the Court.

(c) A notice of appeal shall be deemed to be received by the Court as follows:

(1) On the date of receipt by the Court, if the notice is delivered.

(2) On the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed.

(d) For a notice of appeal to the Court to be deemed to be received under subsection (c)(2) on a particular date, the United States Postal Service postmark on the corner in which the notice is posted must be legible. The Court shall determine the legibility of any such postmark and the Court's determination as to legibility shall be final and not subject to review by any other Court.

38 U.S.C. § 7266. This section does not use the word "jurisdiction" nor does it fall under the subchapter of jurisdiction.

There is good reason for this. Congress enacted a specific jurisdictional section. It is

Chapter 72: United States Court of Appeals for Veterans Claims, *Subchapter I: Organization and Jurisdiction*, Section 7252 *Jurisdiction*: Finality of decisions –

> (a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.
>
> (b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of such review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.
>
> (c) Decisions by the Court are subject to review as provided in section 7292 of this title.

38 U.S.C. § 7252 (2006). This section not only falls under the subchapter of jurisdiction, but is appropriately named "Jurisdiction" and describes

both the Court's subject matter jurisdiction and personal jurisdiction in the first subsection.

Comparing the two, it is clear that Congress did not explicitly state that § 7266 was jurisdictional. *See Reed Elsevier*, 130 S.Ct. at 1244. Therefore, compliance with § 7266 "is not *automatically* 'a jurisdictional prerequisite to suit,' " but rather must be analyzed for the " 'legal character' of the requirement" that a veteran claimant file a notice of appeal within 120 days of a Board decision. *Id.* at 1246 (quoting *Zipes*, 455 U.S. at 393, 395) (emphasis added). This analysis considers the "text, context, and relevant historical treatment" of the statute. *Id.*

As noted above, § 7252, not § 7266, is labeled "jurisdiction." Only § 7252, not § 7266, names " 'the classes of cases' " that can be brought before the Court of Appeals for Veterans Claims or those parties who can bring such actions, *Reed Elsevier*, 130 S.Ct., at 1243 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)); it states the "class of case" – review of Board decisions – and the party that can bring suit – the claimant, not the Secretary. 38 U.S.C. § 7252(a). Thus, the text does not "demonstrate that Congress 'ranked' the requirements [in § 7266] as jurisdictional." *Id.* at 1244 (quoting *Arbaugh*, 546 U.S. at 513-16).

Additionally, the context of the section does not indicate that Congress " 'ranked' the requirements as jurisdictional." *Reed Elsevier*, 130 S.Ct. at 1244. Similar to the provision in *Arbaugh*,

§ 7266 is located in an entirely separate subchapter from § 7252. *Compare* Subchapter I: Organization and Jurisdiction *with* Subchapter II: Procedure. The names of the subchapters also imply that Congress understood there was a distinction to be made between jurisdiction and "claim-processing requirements." *See Eberhart v. United States*, 546 U.S. 12, 15-16 (2005) (acknowledging that claims-processing rules are nonjurisdictional).

Finally, the historical treatment of § 7266 does not indicate that it should be treated as jurisdictional, to overcome the other two analytical factors. *See Reed Elsevier*, 130 S.Ct. at 1248. While the *Bowles* Court highlighted that the Court had a long history of regarding "statutory limitations on the timing of appeals as limitations" on a court's jurisdiction, *see Bowles*, 551 U.S. at 210 (citing *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883); *United States v. Curry*, 6 How. 106, 113 (1848)), this history has nothing to do with the Court of Appeals of Veterans for Claims. Rather, the Court was focusing on appeals to Article III circuit courts from trial courts, not appeals to Article I courts from agency decisions.

The brief, recent history of the Court of Appeals for Veterans Claims is quite different. For much of that history, 38 U.S.C. § 7266 was not considered jurisdictional and equitable tolling was available to veterans. *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998); *see, e.g., Menominee Indian Tribe of Wisc. v. United States*, ___ F.3d ___, 2010 WL 2977225 (D.C. Cir. July 30, 2010) (discussing the

historical treatment of 41 U.S.C. §601, enacted in 1994, as opposed to the statute in *Bowles*). Further, Congress was aware of this Court's historical stance on timely filing at the time it created the Court of Appeals for Veterans Claims and did not include the time limitation within the jurisdictional section of the statute. In fact, Congress did not even place the Court of Appeals for Veterans Claims within the same title as the circuit courts, as it did the Court of International Trade, 28 U.S.C. §1581 (2006), and the United States Court of Federal Claims. 28 U.S.C. §1491 (2006).

By comparison, statutes pertaining to other Article I courts, in particular the Tax Court and the Court of Appeals for the Armed Forces (CAAF), more clearly indicate that the filing of a timely petition is jurisdictional. See 26 U.S.C. §6213 (2006); 10 U.S.C. §867 (2006). The Tax Court's governing statute states that a taxpayer may file a petition with the Tax Court for a redetermination of a deficiency within 90 days of notice being mailed. 26 U.S.C. §6213(a). This section establishes the Tax Court's subject matter and personal jurisdiction: the court can decide cases regarding redeterminations of tax deficiencies and the appropriate party to bring suit is a taxpayer. The statute continues that the "Tax Court shall have *no jurisdiction* to enjoin any action or proceeding or order any refund under this subsection *unless a timely petition for a redetermination has been filed.*" *Id.* (emphasis added). This clearly shows Congress can establish a jurisdictional time limitation for an Article I court and knows to place it in the appropriate section.

Further, the Tax Court, Court of Appeals for the Second Circuit, and Court of Appeals for the D.C. Circuit have all ruled that the 90 days is a jurisdictional time limit. *Hoffenberg v. Comm'r of Internal Revenue*, 905 F.2d 665 (2d Cir. 1990); *Block v. Comm'r of Internal Revenue*, 2 T.C. 761 (1943); *Stebbins' Estate v. Helvering*, 121 F.2d 892 (D.C. Cir. 1941).

With regard to the CAAF, the statute provides that the "accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days" of the decision. 10 U.S.C. § 867(b). While the language is not as plain as the Tax Court statute, it nonetheless is located within the same statute that delineates both the subject matter and personal jurisdiction, and the CAAF has held that, in light of *Bowles*, it is jurisdictional. *United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009).[7]

On its face, 38 U.S.C. § 7266 is not clearly labeled a jurisdictional statute and its context in the statutory scheme does not indicate that it should be considered jurisdictional. Nor is there any evidence Congress "ranked" it as jurisdictional. *See, e.g.*,

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[7] The CAAF had previously held that its time limits were not jurisdictional, in order to be "consistent with Congress's intent that servicemembers have the opportunity to obtain appellate review in an independent civilian court." *United States v. Tamez*, 63 M.J. 201, 202 (C.A.A.F. 2006) (citing *United States v. Byrd*, 53 M.J. 35 (C.A.A.R. 2000); *United States v. Ponds*, 1 C.M.A. 385 (1952)). The C.A.A.F. had, until *Bowles*, allowed for filing out of time if the petitioner could show good cause. *Id.*

Henderson, 589 F.3d at 1224-30 (dissent's analysis of non-jurisdictional nature of § 7266). Finally, there is no strong history of § 7266 being treated as jurisdictional, so the only reasonable conclusion is that it is not a jurisdictional statute. If Congress did not intend the statute to be jurisdictional, then the rebuttable presumption favoring the availability of equitable tolling in suits against the government should apply.[8] *Irwin*, 498 U.S. at 95-96.

IV. CONGRESS CREATED THE COURT OF APPEALS FOR VETERANS CLAIMS TO PROVIDE JUDICIAL REVIEW FOR VETERANS, NOT DENY IT, AND DID NOT MAKE 38 U.S.C. § 7266 STRICTLY JURISDICTIONAL.

Bowles has been cited in several decisions by this Court, mainly for the proposition that only Congress may determine a court's jurisdiction. *See, e.g., Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. Of Adjustment, Central Region*, 130 S.Ct. 584 (2009). In the *Union Pacific* case, the Court began by noting:

> [T]here is surely a starting presumption that when jurisdiction is conferred, a court may not decline to exercise it. *See* R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, HART & WECHSLER'S THE

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[8] The Federal Circuit had previously held that there was no express congressional intent that tolling should not apply. *Bailey v. West*, 160 F.3d 1360 (Fed.Cir.1998) (*en banc*).

> FEDERAL COURTS AND THE FEDERAL SYSTEM 1061-1062 (6th ed. 2009). The general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies.

Union Pacific, 130 S.Ct. at 590.

Congress created the Court of Appeals for Veterans Claims as an Article I court with the sole purpose of providing judicial review where it had previously been forbidden. It would be difficult to make a clearer policy argument in favor of judicial review for veterans, so the situations where the court may "decline to exercise" that jurisdiction should be few and clearly defined. *See generally* VJRA. In creating the Court of Appeals for Veterans Claims and the circumstances under which veterans may obtain judicial review, Congress created no impediment so severe as that now imposed by the Federal Circuit. Rather, given the history preceding the VJRA, the opposite should be presumed: Congress intended to confer jurisdiction to consider the particular controversies of veterans who had been denied by the agency.

There is no dispute that a claimant must establish jurisdiction in the Court of Appeals for Veterans Claims. *See Bethea v. Derwinski*, 2 Vet.App. 252, 255 (1992) (*citing McNutt v. GMAC*, 298 U.S. 178, 181 (1936)). While the court must have an orderly way to conduct its business, it must also undertake the case-by-case analysis required

when something goes awry in a veteran's attempt to appeal. As *Irwin* v. *Shinseki*, *Rickett*, and other recent similar cases demonstrate, problems continue to exist; veterans are sometimes confused about how to preserve their appeals rights, and the way VA handles their correspondence only adds to the confusion. *See Posey*, 23 Vet App. at 409-11.

That confusion may now be fatal to their claims. The burden imposed by *Henderson* presupposes knowledge that many veterans simply do not have. Most veterans do not retain counsel at the agency, and most are still pro se upon filing with the Court of Appeals for Veterans Claims. *See* U.S. Court of Appeals for Veterans Claims Annual Reports, *available at http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf* (showing pro se rates have ranged from 53% to 70% at the time of filing over ten years). Veterans are at a disadvantage when bringing suit against the government, and this Court has interpreted timing provisions to protect claimants who may be at a disadvantage in litigation. *See, e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 478-80 (1986) (finding "compelling" reasons for equitable tolling where the Social Security Administration had a secret policy to deny the claims of mentally disabled applicants).

While *Henderson* further disadvantages veterans, equitable tolling causes no harm or disadvantage to either VA or the lower court. The Federal Circuit had reached the same conclusion in an earlier decision. "We also observe that: (1) the

120-day period for appeal is relatively short, especially considering that most claimants are not represented by counsel; (2) the government is unlikely to experience prejudice as a result of the delay; and (3) the record has been fully developed." *Barrett*, 363 F.3d at 1320.

There has been no action by Congress, and neither *Bowles* nor *Henderson* provide a compelling reason for veteran appellants to now be treated so differently from how they have been since 1998. *Henderson* impedes the implementation of Congress's goal in creating an avenue for veterans to appeal their VA claims. The Court should reverse the Federal Circuit and reinstate the prior cases allowing equitable tolling for veterans appeals.

CONCLUSION

For the foregoing reasons, in addition to those provided by Mr. Henderson, the Court should reverse the Federal Circuit and find that equitable tolling remains available to veterans.

Respectfully submitted

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AMICUS CURIAE BRIEF

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No. 09-1036

IN THE
Supreme Court of the United States

DAVID L. HENDERSON,

Petitioner,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* UNITED SPINAL ASSOCIATION IN SUPPORT OF PETITIONER DAVID L. HENDERSON

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. CONGRESS INTENDED JUDICIAL REVIEW OF VETERANS CLAIMS TO BE "ACCURATE, INFORMAL, EFFICIENT, AND FAIR" 4

II. THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 7266 FAILS TO ACHIEVE CONGRESS'S GOALS 6

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Arbas v. Nicholson,
403 F.3d 1379 (Fed. Cir. 2005) 9

Bailey v. West,
160 F.3d 1360 (Fed. Cir. 1998) (en banc) 7

Barrett v. Principi,
363 F.3d 1316 (Fed. Cir. 2004) 9

Bowles v. Russell,
551 U.S. 205 (2007) 5

Henderson v. Shinseki,
589 F.3d 1201 (Fed. Cir. 2009) (en banc) 9, 10

Jaquay v. Principi,
304 F.3d 1276 (Fed. Cir. 2002) (en banc) 7

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 5

STATUTES

38 U.S.C. § 5103A 6

38 U.S.C. § 7266 ..... *passim*

OTHER AUTHORITIES

H.R. Rep. No. 100-936 (1988), *as reprinted in*
1988 U.S.C.C.A.N. 5782 ..... 4, 5, 10

James T. O'Reilly, *Burying Caeser: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001) 8

Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361 (2009) 6

Veterans Court, Annual Reports (2000-2009), *available at* http://www.uscourts.cavc.gov/annual_report 7, 9

INTEREST OF *AMICUS CURIAE*

United Spinal Association is a nonprofit organization formed in 1946 by paralyzed veterans. It has served in the interests of veterans and their families ever since.[1] Fully recognized by the U.S. Department of Veterans Affairs as a national veterans service organization, United Spinal has several thousand veteran members in its ranks.

The organization's mission is to improve the quality of life of Americans with spinal-cord injuries. United Spinal provides services to veterans through its VetsFirst program, in which it provides direct representation and counseling to all veterans, regardless of their membership status or type of disability, as well as to their dependents and survivors. United Spinal also maintains a network of VA-accredited veterans service representatives across the nation to assist veteran claimants for VA benefits in their communities. Further, United Spinal's public policy component advocates on behalf of veterans before Congress and state legislatures.

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[1] The Government has consented to the filing of this brief, and Mr. Henderson has filed a letter with the Court consenting to the filing of amicus briefs in support of either party. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission.

United Spinal has a strong interest in this case. Equitable tolling of 38 U.S.C. § 7266 has provided a vital safeguard for veterans with serious physical and mental disabilities, including disabilities resulting from spinal-cord injuries. Many veterans with spinal-cord injuries will be affected adversely under the Federal Circuit's decision in this case. United Spinal therefore supports the petitioner, Mr. Henderson, and urges reversal of the Federal Circuit's judgment.

SUMMARY OF ARGUMENT

In establishing the Court of Appeals for Veterans Claims ("Veterans Court"), Congress was careful to express its intent that judicial review of VA decisions be "[a]ccurate, informal, efficient, and fair." Congress further made clear that achieving those goals was the responsibility of all three branches of government. The Federal Circuit's decision frustrated those goals, however, when it interpreted the "notice of appeal" under section 7266(a) as a rigid filing deadline for unwary veteran claimants. Those veteran claimants are accustomed to the VA's non-adversarial and sympathetic system, which culminates in a decision of the Board of Veterans' Appeals (the "Board"). Now, just at the point in the process when a veteran seeks judicial review of a Board decision denying him benefits, and moves to the truly adversarial forum of the Veterans Court, he can be easily stymied by an inflexible deadline no longer subject to equitable tolling, even

under traditionally deserving circumstances where the veteran missed the deadline due to the VA's negligence.

Adding to the unfairness is that most of these "notices of appeal" are filed by self-represented claimants, and often by veterans who miss the 120-day deadline because of the very disabilities for which they seek benefits, as Mr. Henderson did. Moreover, published statistics of the Veterans Court show that roughly 80% of Board decisions that are challenged in the Veterans Court are reversed or remanded for further proceedings. That means that, in all likelihood, the majority of cases dismissed as untimely under the Federal Circuit's interpretation of section 7266(a) were incorrectly decided.

By foreclosing equitable tolling of section 7266(a), the Federal Circuit has set up an unnecessarily formal and unfair procedural roadblock to many disabled, *pro se* veterans, instead of fulfilling its mandate to ensure informality and fairness in the veterans benefits system. The Federal Circuit's decision should be reversed.

ARGUMENT

I. CONGRESS INTENDED JUDICIAL REVIEW OF VETERANS CLAIMS TO BE "ACCURATE, INFORMAL, EFFICIENT, AND FAIR"

"Accurate, informal, efficient, and fair." Those were the goals of the veterans benefits system, as envisioned by Congress when it enacted the Veterans' Judicial Review Act to establish the Veterans Court. H.R. Rep. No. 100-936 at 26 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5808. Members of Congress understood that the Act marked a shift in responsibility within the federal government for ensuring the fair treatment of veterans. "[A]chievement of these goals is no longer solely the function of the executive branch, with an occasional nudge from Congress. By allowing courts to review VA policy, the Congress is entrusting the courts with an important responsibility." *Id.* Thus, Congress explicitly made clear that the goals of the veterans benefits system were shared by all three branches of government.

Before creation of the Veterans Court, advocates of judicial review had long been concerned that the Board gave "scant attention to appeals." *Id.* at 5792. The Veterans Court was viewed as a means of ensuring the accuracy and fairness of a system that awarded disability benefits to deserving veterans and their families. *Id.* at 5808. In providing a way for veterans to challenge VA

decisions in court, members of Congress trusted that the judiciary would keep the goals of the veterans benefits system in mind and would not overly formalize the system:

> If as a result of the enactment of this legislation, the perception of the VA system is that it has become inefficient, formalized, and unfair, and accuracy in decision-making becomes a fortuitous event rather than a consistent one, veterans will bear the burden of the change. The committee has always been mindful of this possibility, and trusts that courts are no less aware of the vital interests which are at stake.

Id.

The Federal Circuit's decision, however, interprets section 7266(a) based on a flawed reading of a non-veterans case, *Bowles v. Russell*, 551 U.S. 205 (2007), rather than on this Court's veterans caselaw, which consistently has called for liberal construction of veterans statues in the beneficiary's favor. *See, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) ("provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"). The result is a decision that is clearly at odds with Congress's stated goals, and for at least the reasons discussed below, invites the very perception of the benefits system that Congress warned against.

II. THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 7266 FAILS TO ACHIEVE CONGRESS'S GOALS

First, initiating proceedings before the Veterans Court under section 7266(a) is the first step for claimants outside the VA's non-adversarial disability-benefits-claim process. Until that point, the Secretary has a duty to assist any claimant seeking benefits. 38 U.S.C. § 5103A. Thus, section 7266(a) is most naturally understood to provide a limitations period for challenging an adverse Board decision, as Mr. Henderson argues. *See* Brief for Petitioner at 19. In the context of the veterans benefits system, the transition from an agency-level proceeding to a judicial proceeding is difficult to navigate for *pro se* veterans accustomed to non-adversarial proceedings before the Board. As Professor Michael Allen has observed, "[w]hatever the reality is, there has been, and remains, a tension between the agency-level process and the unquestionably traditional adversarial process at the Veterans Court and beyond. In a sense, veterans transitioning from one system to another have the potential to be caught unaware of new rules and other formalities." Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361, 379 (2009) (footnote omitted). Under the Federal Circuit's interpretation of section 7266(a), many veterans and claimants who previously relied on the

agency's assistance throughout the claims process will be caught off guard by the now rigid filing deadline. Already, the Veterans Court has dismissed over 100 cases as untimely under section 7266(a) in the nine months since the Federal Circuit's decision—a rate of over three dismissals per week.[2] Many of those cases likely would have been procedurally safeguarded by equitable tolling under prior Federal Circuit rulings. *See Jaquay v. Principi*, 304 F.3d 1276, 1289 (Fed. Cir. 2002) (en banc) (holding that veteran who "actively pursues his judicial remedies" is entitled to equitable tolling under section 7266); *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (en banc) ("a veteran's inducement by an adversary's conduct is akin to grounds sufficient to toll a limitations period in a private suit.").

Second, the majority of claimants are self-represented when they initiate proceedings in the Veterans Court. In the past three years, the number of claimants who are self-represented at the time of filing has increased from 53% in 2007, to 64% in 2008, and to 68% in 2009. *See* Veterans Court, Annual Reports (2000-2009), *available at* http://www.uscourts.cavc.gov/annual_report. Appearing *pro se* only increases a veteran claimant's risk of

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[2] A review of the Veterans Court's orders reveals 133 orders relying on the Federal Circuit's decision on December 17, 2009. The Veterans Court's orders can be searched at http://search.uscourts.cavc.gov/.

being caught in the transition from the agency-level proceeding to the adversarial, judicial proceeding of the Veterans Court. Indeed, of the 133 claimants whose cases have been dismissed as untimely filed since the Federal Circuit's decision, 109 were self-represented.[3] That is a frustrating result because, as Professor James O'Reilly has observed, "[a] study of veterans' jurisprudence illustrates a pattern of unfairness that allows systematic VA staff delays, but consistently rejects claims by unrepresented veterans who miss deadlines." James T. O'Reilly, *Burying Caeser: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 234 (2001).

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[3] *See* Vet. App. Nos. 09-3091; 09-3253; 09-3389; 09-3548; 09-3566; 08-3698; 09-3864; 09-3959; 09-4011; 09-4027; 09-4030; 10-4076; 09-4086; 09-4094; 09-4153; 09-4207; 09-4230; 09-4232; 09-4308; 09-4311; 09-4508; 09-4519; 09-4546; 09-4602; 09-4608; 09-4622; 09-4631; 09-4663; 09-4666; 09-4669; 09-4707; 09-4718; 09-4743; 09-4760; 09-4767; 09-4768; 09-4774; 09-4785; 09-4786; 09-4787; 09-1512; 10-0105; 10-0112; 10-0258; 10-0301; 10-0321; 10-0365; 10-0432; 10-0438; 10-0477; 10-0483; 10-0487; 10-0527; 10-0532; 10-0535; 10-0542; 10-0547; 10-0549; 10-0562; 10-0582; 10-0628; 10-0655; 10-0761; 10-0805; 10-0807; 10-0811; 10-0849; 10-0865; 10-0919; 10-0924; 10-0967; 10-1008; 10-1034; 10-1129; 10-1135; 10-1146; 10-1178; 10-1179; 10-1189; 10-1211; 10-1255; 10-1266; 10-1401; 10-1417; 10-1418; 10-1449; 10-1451; 10-1483; 10-1490; 10-1494; 10-1498; 10-1518; 10-1527; 10-1544; 10-1560; 10-1569; 10-1684; 10-1685; 10-1704; 10-1756; 10-1757; 10-1811; 10-1879; 10-1958; 10-2006; 10-2053; 10-2074; 10-2087; 10-2351. Veterans Court dockets are available at https://efiling.vetapp.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp.

Third, many veterans are unable to meet the 120-day deadline as a result of the very disabilities for which they seek benefits. The Federal Circuit had previously tolled the limitations period of section 7266(a) when mental or physical illnesses prevented a timely filing. *See, e.g., Arbas v. Nicholson*, 403 F.3d 1379, 1382 (Fed. Cir. 2005); *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004). The court applied common sense in construing section 7266(a) in order to reach the conclusion that tolling was warranted. According to the court in *Barrett*, "[i]t would be both ironic and inhumane to rigidly implement section 7266(a) because the condition preventing a veteran from timely filing is often the same illness for which compensation is sought." 363 F.3d at 1320; *see also Henderson v. Shinseki*, 589 F.3d 1201, 1221 (Fed. Cir. 2009) (en banc) (Mayer, J., dissenting).

Fourth, most of the Board's decisions challenged in the Veterans Court are flawed in some manner, as indicated by the results of the appealed decisions. From 2000 to 2009, for example, the Veterans Court reversed or remanded an average of 1,762 cases per year, while only affirming an average of 403 cases. *See* Veterans Court, Annual Reports (2000-2009). Applying those statistics to the three cases per week dismissed as untimely under the Federal Circuit's interpretation of section 7266(a), means that the Veterans Court is dismissing challenges to many wrongly decided Board decisions. That result is manifestly unfair and unjust to

veterans and their dependents who seek disability benefits under what is supposed to be a system that is "[a]ccurate, informal, efficient, and fair."

In his opinion concurring with the Federal Circuit majority, Judge Dyk agreed that the majority's reading of section 7266 "can and does lead to unfairness." *Henderson*, 589 F.3d at 1221. In particular, he noted that self-represented veterans are particularly at risk and that service-connected illnesses can lead to late filings, as in Mr. Henderson's case. *Id.* Judge Dyk, however, concluded that the best solution was congressional amendment of section 7266(a) to allow equitable tolling. *Id.* But as previously discussed, Congress entrusted *the judiciary* with safeguarding its stated goals. H.R. Rep. No. 100-936 at 26 ("achievement of these goals is no longer solely the function of the executive branch, with an occasional nudge from the Congress."). Forcing veterans to seek legislative relief from the Federal Circuit's decision would merely demonstrate that the judiciary has failed to ensure the accuracy, informality, efficiency, and fairness of the VA's decision-making process.

CONCLUSION

For these reasons, United Spinal supports the petitioner Mr. Henderson and respectfully requests reversal of the judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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